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APPENDIX

IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

NO. 971

70-40

MARY DOE, et al, etc.,

Appellants,

-v.-

ARTHUR K. BOLTON, Attorney General
of the State of Georgia, et al, etc.,

Appellees.

On Appeal from the United States District Court
For the Northern District of Georgia

Filed November 14, 1970

Jurisdiction Postponed May 3, 1971

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APPENDIX

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RELEVANT DOCKET ENTRIES

Date		Proceedings
1970		
Apr. 16		Complaint (class action) for declaratory & injunctive relief, with request for three-judge court, & Sealed Affidavit, filed.
17		Pltf's motion for temporary restraining order, with affidavit of Margie Pitts Hames, br. in support & proposed order, filed.
27		Order appointing Ferdinand Buckley guardian ad litem for purpose of representing interests of said unborn child, & that he file an answer & any other pleadings necessary to the protection of the interests of the unborn child within 15 days from this date; that guardian ad litem shall have right to participate in all discovery proceedings authorized by law, shall be served with copies of all pleadings & discovery proceedings & shall appear in behalf of said unborn child in all hearings in the case, filed.
May 1		Order of Judge Brown, designating Dist. Judges Sidney O. Smith, Jr. & Albert J. Henderson, Jr. and Cir. Judge Lewis R. Morgan, to constitute a 3-Judge Court, filed.
		ANSWER of Guardian ad Litem of unborn child of MARY DOE, including COUNTER-CLAIM - filed.
5		ANSWER of LEWIS R. SLATON, DIST. ATTY. OF FULTON CO., filed.

RELEVANT DOCKET ENTRIES—continued

Date
1970

Proceedings

- 6 ANSWER of deft. HERBERT T. JENKINS, filed.
Order revoking and setting aside appointment of guardian ad litem & that guardian is free to proceed as amicus curiae in case now referred to a three-judge panel filed.
- 11 Deft's. MOTION to dismiss, with brief in support, filed.
- 13 Motion for reconsideration of order revoking appointment of guardian ad litem of unborn foetus with brief in support, filed.
- June 2 Motion of Ferdinand Buckley to intervene, with brief in support and Appendix "A", filed.
- 8 Motion to dismiss as to Mary Doe, filed by deft., LEWIS R. SLATON with brief in support filed.
Deft., LEWIS R. SLATON'S, interrogatories to pltf., Mary Doe - filed.
Motion fo deft., LEWIS R. SLATON, to dismiss as to Peter G. Bourne, et al, with brief in support, filed.
- 15 Pltf's (MARY DOE) answers to interrogatories propounded by deft. LEWIS R. SLATON, filed.
Deft. LEWIS R. SLATON'S motion for an order requiring the disclosure of the iden-

RELEVANT DOCKET ENTRIES—continued

Date
1970

Proceedings

tity of Mary Doe so that the names defts. may properly prepare their defense, filed.

Deft. LEWIS R. SLATON'S motion for a physical & mental examination of the pltf. Mary Doe, filed.

Deft. LEWIS R. SLATON'S motion for continuance, filed.

TRIAL — NON-JURY — 3-JUDGE. Ct. (Morgan) stated arguments would be limited to two issues, *i.e.*, jurisdiction & merits.

- 31 Order filed denying Arthur Bolton's motion to dismiss him as a party; that no ruling is necessary on Atty. Gen.'s objection to interrogatories; granting motion of Nat'l Legal Program of Health Problem of the Poor to submit a brief amicus curiae; denying Lewis R. Slaton's motions to require disclosure of pltf's identity & further discovery; denying motion of Ferdinand Buckley for reconsideration, and finding that:

"Portions of Ga. Code Section 26-1202 to be in violation of the constitutional rights of petitioner: A. Section (a) beginning with the word "because" on line 5 and thru subsection (a)(3) in its entirety. B. Section (b) subsection (3) beginning with the word "because" on line 6 and thru the end of

RELEVANT DOCKET ENTRIES—continued

Date
1970

Proceedings

said subsection. C. Section (b) subsection (6) in its entirety. D. Section (c) in its entirety. . . . the court further finds remainder of Code 26-1202 (Ga.) to constitute a proper exercise of state power within the context of this opinion. * * * Accordingly, pltf's request for a declaratory judgment is hereby granted."

An appropriate formal declaratory judgment may be presented upon request of any party.

- Aug. 25** JUDGMENT filed & entered, that the complaint of all pltfs. except Mary Doe be dismissed; that certain sections of the Ga. Abortion Statute are declared void on their face for unconstitutional overbreadth; that pltfs' application for injunction be dismissed; costs of action are taxed against defts. DENIED request for stay pending appeal.
- Sept. 3** Motion of Ferdinand Buckley as next frined of unborn child of Mary Doe to alter or amend judgment, filed.
- 15** Petition of Jane Roe to intervene as pltf & to clarify & enforce the courts' opinion of July 31, 1970, filed.
- 18** Defts' notice of precautionary appeal, filed. Defts' notice of appeal to the SUPREME COURT OF U.S., filed.

RELEVANT DOCKET ENTRIES—continued

Date

1970

Proceedings

Pltfs' notice of appeal to the Supreme Court of the U.S., filed.

23 Pltfs'. notice of precautionary appeal, filed.

25 Deft.'s (Arthur K. Bolton) memorandum in opposition of motion to intervene, filed.

Oct. 6 Pltf's. memorandum in support of the petition of Jane Roe to intervene as pltf. and to clarify & enforce the Ct's. opinion of July 31, 1970, filed.

14 ORDER by 3-Judge panel - filed. (1) Amending Judgment of 8-25-70 to deny mot. of Ferdinand Buckley to intervene, etc., Court declined to rule on his appointment as guardian *ad litem*; (2) denying motion of Jane Roe to intervene, for a temporary restraining order and for clarif. of opinion of 7-31-70; (3) in sum, statutory processes of approval are left standing.

[7]

(Filed in Clerk's Office Apr. 16, 1970, Claude L. Goza,
Clerk; By: MJW, Deputy Clerk)

(Received Apr. 20, 1970, United States Marshal, At-
lanta, Georgia)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

MARY DOE; PETER G. BOURNE;
ROBERT HATCHER; LILLAS L. JAMES;
JAMES WATERS; CORBETT TURNER;
NEWTON LONG; EDWARD LEADER;
WILLIAM H. BIGGERS; GEORGE
VIOLIN; PATRICIA S. SMITH; JENNIE
WILLIAMS; JUDITH BOURNE; SUZANNE
DUNAWAY; JOYCE PARKS; LOU ANN
IRION; MARY LONG; J. EMMETT
HERNDON; SAMUEL L. WILLIAMS;
EUGENE PICKETT; RICHARD DEVOR;
DONALD DAUGHTRY; JUDITH ZORACH
and KAREN WEAVER, residents of the
State of Georgia;

PLANNED PARENTHOOD ASSOCIATION
OF ATLANTA, INC., a Georgia corporation;
and GEORGIA CITIZENS FOR HOSPITAL
ABORTION, INC., a Georgia corporation,
for and on behalf of all persons and
organizations similarly situated,

Plaintiffs,

vs.

ARTHUR K. BOLTON, as Attorney General
of the State of Georgia; LEWIS R. SLATON,
as District Attorney of Fulton County,
Georgia and HERBERT T. JENKINS,
as Chief of Police of the City of Atlanta,

Defendants.

CIVIL CASE

NO. 13676

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

1. This is an action for a temporary restraining order,

preliminary and permanent injunction against the enforcement of the Ga. Code Ann. § 26-1201, et seq. (sometimes referred to as the Georgia Abortion Act), which provides as follows:

"26-1201. *Criminal Abortion*

Except as otherwise provided in Section 26-1202, a person commits criminal abortion when he administers any medicine, drug or other substance whatever to any woman or when he uses any instrument or other means whatever upon any woman with intent to produce a miscarriage or abortion.

26-1202. *Exception*

(a) Section 26-1201 shall not apply to an abortion performed by a physician duly licensed to practice medicine [8] and surgery pursuant to Chapter 84-9 or 84-12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary because:

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or

(2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or

(3) The pregnancy resulted from forcible or statutory rape.

(b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

(1) The pregnant woman requesting the abortion certifies in writing under oath and subject to the penalties of false swearing to the

physician who proposes to perform the abortion that she is a bona fide legal resident of the State of Georgia.

(2) The physician certifies that he believes the woman is a bona fide resident of this State and that he has no information which should lead him to believe otherwise.

(3) Such physician's judgment is reduced to writing and concurred in by at least two other physicians duly licensed to practice medicine and surgery pursuant to Chapter 84-9 of the Code of Georgia of 1933, as amended, who certify in writing that based upon their separate personal medical examinations of the pregnant woman, the abortion is, in their judgment necessary because of one or more of the reasons enumerated above.

(4) Such abortion is performed in a hospital licensed by the State Board of Health and accredited [9] by the Joint Commission on Accreditation of Hospitals.

(5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

(6) If the proposed abortion is considered necessary because the woman has been raped,

the woman makes a written statement under oath, and subject to the penalties of false swearing, of the date, time and place of the rape and the name of the rapist, if known. There must be attached to this statement a certified copy of any report of the rape made to any law enforcement officer or agency and a statement by the solicitor general of the judicial circuit where the rape occurred or allegedly occurred that, according to his best information, there is probable cause to believe that the rape did occur.

(7) Such written opinions, statements, certificates, and concurrences are maintained in the permanent files of such hospital and are available at all reasonable times to the solicitor general of the judicial circuit in which the hospital is located.

(8) A copy of such written opinions, statements, certificates, and concurrences is filed with the Director [10] of the State Department of Public Health within ten (10) days after such operation is performed.

(9) All written opinions, statements, certificates, and concurrences filed and maintained pursuant to Paragraphs (7) and (8) of this subsection shall be confidential records and shall not be made available for public inspection at any time.

(c) Any solicitor general of the judicial circuit in which an abortion is to be performed under this section, or any person who would be a relative of the child within the second degree of consanguinity, may petition the superior court of the county in which the abortion is to be performed for a declaratory judgment whether the performance of such

abortion would violate any constitutional or other legal rights of the fetus. Such solicitor general may also petition such court for the purpose of taking issue with compliance with the requirements of this section. The physician who proposes to perform the abortion and the pregnant woman shall be respondents. The petition shall be heard expeditiously and if the court adjudges that such abortion would violate the constitutional or other legal rights of the fetus, the court shall so declare and shall restrain the physician from performing the abortion.

(d) If an abortion is performed in compliance with this section, the death of the fetus shall not give rise to any claim for wrongful death.

(e) Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion, nor shall any hospital be required to appoint a committee such as contemplated under subsection (b)(5). A physician, or any other person who is a member of or associated with the staff of a [11] hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.

26-1203. *Punishment*

A person convicted of criminal abortion shall be punished by imprisonment for not less than one nor more than 10 years."

The plaintiffs seek a declaratory judgment that the above

statute is unconstitutional in that it deprives physicians, their patients, and women desiring abortions of rights protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

2. The plaintiffs invoke this Court's jurisdiction under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution; Title 28, U.S.C.A. §§ 2281 and 2284; and Title 42, U.S.C.A. § 1983.

3. The plaintiffs seek a declaration that the Georgia Abortion Statute is unconstitutional on its face, and as applied, under the Declaratory Judgment Act, Title 28 U.S.C.A. §§ 2201 and 2202.

4. This is a proper case to be heard by a three-judge court, in that plaintiffs are challenging the validity of a State Statute under the United States Constitution and under Title 28, U.S.C.A. §§ 2281 and 2284, and seek an injunction against the enforcement and other implementation and effects of the Statute.

5. Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure because the questions of law and fact are common to plaintiffs and to the classes they represent; [12] the members of the classes are so numerous as to make joinder impracticable; the claims of plaintiffs are typical of the claims of all members of the class; plaintiffs fairly and adequately represent the claims of all the members of the classes; defendants are acting on grounds generally applicable to the entire class; the questions of law and fact common to the class predominate over any question affecting individual members; and because a class action

will best provide a fair and efficient adjudication of the important issue herein.

6. Plaintiff referred to herein as *Mary Doe* is a natural person employing a fictitious name in order to protect her true identity. It is her belief that the use of her true name would subject plaintiff to unfavorable publicity resulting in public embarrassment, ridicule and intimidation. A sealed affidavit containing plaintiff's true identity will be filed with the court.

7. Plaintiff Mary Doe is a 22 year old citizen of the United States and of the State of Georgia residing in the Northern District of Georgia. Plaintiff Doe states that she is presently nine weeks pregnant; she has been advised that an abortion can be performed on her with less danger to health than if she should give birth to such child. Plaintiff has given birth to three children; as to the third child born to her (July 19, 1969), she was placed with adoptive parents. The other two children have recently been placed in a foster home because of plaintiff's poverty and inability to care for said children. Plaintiff's husband recently abandoned her, forcing plaintiff to live with her indigent parents and their eight small children. Out of five years marriage, she and her husband have lived together only about two years. She and her husband have become reconciled, however, they are financially unable to support and care for a child. Mr. Doe is a construction worker and is sporadically employed. Plaintiff has been a mental patient at the Georgia State Hospital in Milledgeville, Georgia. If forced to continue with this pregnancy, plaintiff will suffer irreparable mental anguish and harm, and she will be unable to care for or support such resulting child.

8. On or about March 25, 1970 plaintiff Doe made application to the Abortion Committee of Grady Memorial Hospital to be considered an appli[13]cant for a legal therapeutic abortion as allowed by Ga. Code Ann. § 26-1202. Plaintiff's application was denied on April 10, 1970, by the said Committee on grounds that her present situation did not come within the terms of Ga. Code Ann. § 26-1202(a)(1).

9. Because the Committee has denied plaintiff's application for a therapeutic abortion, plaintiff Doe has been forced to either relinquish her right to decide when and how many children she will bear or to seek an abortion which must be termed illegal under Ga. Code Ann. § 26-1201 in violation of her constitutional rights guaranteed by the First, Ninth, and Fourteenth Amendments. Plaintiff sues on her own behalf and on behalf of all others similarly situated.

10. Plaintiff physicians, listed below, are residents of the State of Georgia, and are licensed to practice medicine in the State of Georgia, namely: *Peter G. Bourne*, Psychiatrist, Mental Health Director, Atlanta Southside Comprehensive Health Center, Faculty member Emory University Medical School; *Robert Hatcher*, Director, Family Planning Services, Grady Memorial Hospital; *Lillas L. James*, private practitioner of medicine specializing in health problems of children and women; *James Waters*, Director of the Adolescent Pregnancy Program, Grady Memorial Hospital; *Corbett Turner*, Child Psychiatrist at Atlanta Southside Comprehensive Health Center and Faculty member Emory University Medical School; *Newton Long*, Director of Maternal-Infant Project at Grady Memorial and professor Obstetrics and Gynecology, Emory University Medical School; *Edward*

Leader, William H. Biggers, Psychiatrists engaged in private practice; *George Violin*, physician.

Patricia S. Smith, Jennie Williams, Judith Bourne, Suzanne Dunaway, Joyce Parks, Lou Ann Irion and Mary Long are registered nurses licensed to practice in the State of Georgia and are residents of said State.

The above listed physicians (obstetricians, gynecologists) and nurses are, on numerous occasions, consulted by pregnant women about unwanted pregnancies. In instances where an abortion is needed, under the medical judgment of such physician, they are placed in the position of [14] being unable to provide for their patients optimum medical care. Because an abortion must be performed in a hospital, Ga. Code § 26-1202(b)(4); because of the burdensome procedure of obtaining two other physicians' concurring opinions and presentation to the hospital abortion committee; and further because of the vagueness of the grounds for abortion, plaintiffs have been chilled and deterred from practicing their professions as medical practitioners to give their patients the benefit of their best medical knowledge and treatment as guaranteed by the First, Fourth and Fourteenth Amendments of the Constitution. Plaintiffs sue on their own behalf and on behalf of all others similarly situated.

11. *Reverend J. Emmett Herndon*, Presbyterian Campus Minister, Emory University, *Reverend Samuel L. Williams*, Minister, Friendship Baptist Church; *Reverend Eugene Pickett*, Minister, Unitarian Universalist Congregation; *Reverend Richard Devor*, Methodist Campus Minister, Emory University, and *Reverend Donald Daughtry*, First Congregation Church, and *Judith Zorach* and *Karen Weaver*, social workers, are residents of

the State of Georgia. As ministers and social workers they are consulted by pregnant women concerning where to obtain safe, speedy and adequate medical care to terminate pregnancies. Plaintiffs wish to provide confidential counselling services to such individuals and offer information concerning such medical care, however, they are chilled and deterred in the practice of their professions and the exercise of their constitutionally guaranteed right of free speech because of the unconstitutional Georgia law referred to above. Plaintiffs sue on their own behalf and on behalf of all others similarly situated.

12. The Honorable Arthur K. Bolton, defendant, is sued in his official capacity as the Attorney General of the State of Georgia; he is charged with the state-wide enforcement and administration of the challenged statutes.

13. The Honorable Lewis R. Slaton, defendant, is sued in his official capacity as District Attorney of Fulton County, Georgia. He is charged with the enforcement and administration of the challenged statutes [15] in Fulton County.

14. Defendant Herbert T. Jenkins is sued in his official capacity as the Chief of Police and is charged with the initial enforcement of the challenged statutes in the City of Atlanta, Georgia.

15. Planned Parenthood Association of Atlanta, Inc., and Georgia Citizens for Abortion, Inc., are non-profit corporations engaged in birth control counselling and are consulted by pregnant women regarding safe, speedy and adequate medical care to terminate unwanted pregnancies.

First Cause of Action

16. As a result of the above statute, plaintiff Mary Doe, and the class she represents, can only obtain a legal abortion if she has been raped, the child would likely be born with a severe mental or physical defect, or the "continuation of her pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health . . ." The quoted basis for abortion is vague and indefinite in that the term health is not defined and it is not clear that it includes varying degrees of mental health as well as physical health. Nor is the degree of possible danger to life from natural causes specified, therefore, the provision as to danger to life is subject to many and varied interpretations. Further, there are no guide lines as to what constitutes serious and permanent injury to health and this is subject to diverse interpretations and plaintiff believes that the law is being interpreted restrictively by some hospital committees and more liberally by others.

17. As a result of the above statute, plaintiff Mary Doe, and the class she represents, can only obtain a legal abortion if she obtains the assistance of psychiatrists and physicians and has them present her request to a hospital abortion committee. The committee must then be convinced that an abortion is necessary to preserve her life or prevent serious and permanent injury to her health. This is a burdensome and costly procedure and denies plaintiffs and other poor persons equal access to medical care and facilities thereby denying equal protection of the laws in contravention of rights guaranteed under the Fourteenth Amendment of [16] the United States Constitution. Additionally, because of the time limitations inherent in pregnancy and the desire of pregnant women

for privacy, it is rarely possible to test the denial of an abortion by a hospital committee by request for review or redress in the courts.

18. Further, the challenged statute is unconstitutional on its face and as applied in that it:

(a) invades plaintiff's right of privacy or liberty in matters related to marriage, family and sex, the sacred right of every individual to the possession and control of her own person; and the right to be left alone as guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution;

(b) chills and deters plaintiff in the exercise of her rights of association, privacy and sexual and family relations as guaranteed by the First, Fourth, Fifth, Ninth and Fourteenth Amendments;

(c) deprives plaintiff of the fundamental right of a woman to choose whether to bear children as guaranteed by the Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments;

(d) deprives plaintiff of the right to safe, speedy and adequate medical care on the basis of wealth in violation of the constitutional guarantee of equal protection of the laws;

(e) denies plaintiff life and liberty without due process of law despite a lack of compelling state interest, in that it forces her to expose herself to the hazards and risks of illegal non-medical abortion in order to terminate an unwanted pregnancy;

(f) deprives plaintiff of safe and adequate medical care on the basis of the religious beliefs of others in viola-

tion of the First Amendment guarantee against the establishment of religion;

(g) denies plaintiff access to information concerning her health, safety and welfare and the availability of safe, speedy and adequate medical care in violation of the guarantees of the First Amendment;

(h) deprives plaintiff of guarantees of due process of law in that the criteria for a legal abortion are unconstitutionally vague and [17] without standards;

(i) deprives plaintiff of what little access she might have to a legal abortion without due process in violation of the Fourteenth Amendment in that it chills and deters doctors and hospitals from performing such medical procedures because of fear of prosecution under the unconstitutionally vague statutes;

(j) constitutes cruel and unusual punishment in violation of the Eighth Amendment in that it forces plaintiffs to bear and raise unwanted children;

(k) deprives plaintiff of equal access to both public and private medical facilities which on information and belief receive substantial federal, state, county, and city funding, such equal access being guaranteed by the Fifth and Fourteenth Amendments to the Constitution.

Second Cause of Action

Plaintiff physicians, psychiatrists, nurses, ministers and social workers named above reallege each allegation specified in paragraphs 16-18 and in addition allege that:

19. The challenged statute is unconstitutional on its face and as applied in that:

(a) the threat of grand jury subpoena and/or prose-

cution under a statute which is void for vagueness under the First and Fourteenth Amendments chills and deters plaintiffs from exercising their rights of free speech guaranteed by the First Amendment to the Constitution in that they are unable to inform women or others seeking information on their behalf, where they can obtain safe, speedy and adequate medical care for the termination of an unwanted pregnancy.

Third Cause of Action

Plaintiff physicians named above in paragraph 10 re-allege each and every allegation specified in paragraphs 16-19 and in addition allege that:

20. The challenged statute is unconstitutional on its face and [18] as applied in that:

(a) it is unconstitutionally vague in violation of the Fourteenth Amendment in that the statute does not establish a formal administrative procedure or body for establishing rules, regulations or official interpretation of the provisions of said statute. Thus, the law is subject to many interpretations by hospital abortion committees and is not uniformly applied throughout the state.

(b) it requires plaintiffs as persons charged with the health of their patients, to determine whether an abortion is necessary to preserve the life of the mother, an incorrect judgment subjecting them to possible criminal prosecution and loss of license to practice medicine;

(c) it chills and deters plaintiffs from practicing their profession as medical practitioners to give their patients the benefit of their best medical knowledge and from fulfilling their duties and responsibilities in the highest traditions of their professions as guaranteed by the First, Fifth and Fourteenth Amendments to the Constitution.

21. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs respectfully pray that:

1. Pursuant to Title 28 U.S.C. §§ 2282 and 2284 a three-judge district court be convened to hear and determine this proceeding;

2. A declaratory judgment be issued holding the Georgia Abortion Statute, Ga. Code Ann. § 26-1201, *et seq.* to be in violation of the rights of plaintiffs as protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution;

3. Pending the hearing and determination of the prayers for permanent relief the Court enter an interlocutory injunction restraining the defendants, their agents, and successors from in any way enforcing or threatening to enforce the aforementioned statutes;

4. A permanent injunction be entered restraining and enjoining defendants, their agents, and successors from enforcing, threatening to [19] enforce, or otherwise applying the challenged statute in derogation of the rights of plaintiffs;

5. They be granted such other relief as may seem to this Court appropriate.

Respectfully submitted,

/s/ MARGIE PITTS HAMES

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/s/ TOBIANE SCHWARTZ

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Attorneys for Plaintiffs

[20]

UNITED STATES DISTRICT COURT

MARY DOE, et al,

Plaintiff

VS.

ARTHUR K. BOLTON, et al,

Defendants

CIVIL CASE

NO. _____

AFFIDAVIT

This is to certify that this envelope contains the affidavit disclosing the identity of Mary Doe Plaintiff in the above case. This envelope is not to be opened except on order of the Court and notice to the undersigned attorney for Plaintiff.

This 16th day of April, 1970.

/s/ MARGIE PITTS HAMES

MARGIE PITTS HAMES
Attorney for Plaintiffs
210 Brighton Rd., N.E.
Atlanta, Georgia 30309
355-8998

[22]

(Filed in Clerk's Office Apr. 17, 1970, Claude L. Goza,
Clerk. By: MJW Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.

-vs-

ARTHUR K. BOLTON, et al.

} CIVIL ACTION
NO. 13676

**MOTION FOR TEMPORARY RESTRAINING
ORDER**

Comes now the plaintiff in the above-styled action and moves this Court for a Temporary Restraining Order enjoining and restraining the defendants, and each of them, from enforcing, threatening to enforce, or otherwise applying the Georgia Abortion Statute, 26 Ga. Code Ann. § 1201, *et seq.*, in derogation of the rights of plaintiff. As grounds, plaintiff shows that:

(a) She has challenged the constitutionality of the Georgia Abortion Statute, 26 Ga. Code Ann. § 1201, *et seq.*

(b) Plaintiff, Mary Doe, is a pregnant woman (9 weeks) who desires an abortion.

(c) Plaintiff has attempted to obtain an abortion by applying to the Therapeutic Committee of Grady Memorial Hospital as allowed by 26 Ga. Code Ann. § 1202.

(d) Plaintiff's application was denied by the committee on the grounds that her situation did not come within the terms of 26 Ga. Code Ann. § 1202(a)(1).

(e) If forced to comply with the Georgia Abortion Statute, plaintiff will suffer irreparable mental anguish, be forced to bear an unwanted child whom plaintiff will be unable to care for or support, and will thus be caused irreparable harm and injury.

(f) In order to receive good medical care, plaintiff must obtain an abortion before she is 16 weeks pregnant.

(g) Plaintiff believes that she has a right to receive an abortion, and any infringement upon this right is a denial of basic constitutional guarantees.

(h) Plaintiff has no administrative remedy by which she can seek review or question the decision of the Abortion Committee.

(i) Plaintiff has been advised that a licensed physician has [23] agreed to perform an abortion on her if this Court enjoins defendants from enforcing of said Statute as to him.

(j) The named defendants will not be injured by the issuance of such a Temporary Restraining Order.

Respectfully submitted,

Attorneys for Plaintiff

/s/ MARGIE PITTS HAMES

[24]

STATE OF GEORGIA }
 COUNTY OF FULTON } SS

AFFIDAVIT

Comes now, Margie Pitts Hames, who first being put upon oath, deposes as follows:

That I am a member of the Bar of the State of Georgia and of the United States District Court for the Northern District of Georgia;

That I am one of the attorneys representing the plaintiffs herein;

That based on information and belief, I believe the facts in the complaint and in the motion for temporary restraining order to be true;

That I have given notice by telephone April 15, 1970, 3:10 p.m. to defendants that I intend to present this motion for temporary restraining order on April 17, 1970, at 9:30 a.m.

The foregoing is true and correct, based on personal knowledge, information and belief, and is given for use in legal proceedings.

This 17 day of Apr., 1970.

/s/ MARGIE PITTS HAMES

 MARGIE PITTS HAMES

Subscribed and sworn to before me
 this 17 day of April, 1970.

/s/ EUGENE S. TAYLOR

 Notary Public, State of Georgia

My Commission Expires: Dec. 22, 1972.

[41]

(Filed in Clerk's Office Apr. 27, 1970, Claude L. Goza,
Clerk; By: JAR, Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,

Plaintiffs

v.

ARTHUR K. BOLTON, et al.,

Defendants

CIVIL ACTION
NO. 13676

ORDER APPOINTING GUARDIAN AD LITEM

It appearing to the Court from the allegations of the complaint that the interests of the unborn child of the plaintiff Mary Doe could be adversely affected by the granting of the relief prayed for in plaintiffs' complaint, and that the interests of the unborn child may not be adequately represented by any of the parties named in the complaint, it is hereby ordered that Ferdinand Buckley, be, and he hereby is, appointed guardian ad litem for the purpose of representing the interests of said unborn child, and that said guardian ad litem file an answer and any other pleadings necessary to the protection of the interests of the unborn child within 15 days from this date. Said guardian ad litem shall have the right to participate in all discovery proceedings authorized by law, shall be served with copies of all pleadings and discovery proceedings, and shall appear in behalf of said unborn child in all hearings in the case.

This 25th day of April, 1970.

/s/ SIDNEY O. SMITH

United States Judge

[44]

(Filed in Clerk's Office May 1, 1970, Claude L. Goza,
Clerk; By: JWE, Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,

Plaintiffs

v.

ARTHUR K. BOLTON, et al.,

Defendants

CIVIL ACTION
NO. 13676

ANSWER OF GUARDIAN AD LITEM
OF UNBORN CHILD OF MARY DOE

Comes now the guardian ad litem of the unborn child
of Mary Doe, and files this answer to plaintiffs' com-
plaint in behalf of said unborn child.

FIRST DEFENSE

Said complaint fails to state a claim upon which
relief can be granted to Mary Doe or to any of the other
plaintiffs named in said complaint.

SECOND DEFENSE

Said complaint fails to state a claim for equitable re-
lief in behalf of Mary Doe or any of the other plaintiffs
named in said complaint.

THIRD DEFENSE

As to plaintiff Mary Doe, said action is not being
prosecuted in the name of a real party in interest as
required by Rule 17(a) of the Federal Rules of Civil
Procedure.

FOURTH DEFENSE

Said complaint fails to join the father of the [45] unborn child of Mary Doe and therefore said complaint fails to join an indispensable party as required by Rule 19(a) of the Federal Rules of Civil Procedure.

FIFTH DEFENSE

1.

The unborn child of Mary Doe denies that plaintiffs are entitled to any relief sought in paragraphs 1 and 2 of said complaint, and specifically denies that any right of plaintiffs protected by the First, Fourth, Fifth, Ninth or Fourteenth Amendment to the United States Constitution is at issue in this action.

2.

The unborn child of Mary Does denies that plaintiffs are entitled to the relief sought in paragraph 3 of said complaint.

3.

The unborn child of Mary Doe denies that plaintiffs are entitled to the relief sought in paragraph 4 of said complaint.

4.

The unborn child of Mary Doe denies that plaintiffs are entitled to the relief sought in paragraph 5 of said complaint.

5.

Answering paragraph 6 of said complaint, the unborn child of Mary Doe avers that for want of information sufficient to form a belief, said unborn child is unable to admit or deny the allegations of paragraph 6 of said

complaint but demands strict proof thereof. Further answering said allegations, said unborn child denies that it is necessary or proper for said plaintiff to conceal her [46] identity from the Court or from the unborn child.

6.

Answering paragraph 7 of said complaint, the unborn child of Mary Doe avers on information and belief that Mary Doe is at least fifteen weeks pregnant, but for want of information sufficient to form a belief, the unborn child is unable to admit or deny the remaining allegations of said paragraph of said complaint, except that the allegations of the last sentence of paragraph 7 of said complaint are specifically denied.

7.

For want of information sufficient to form a belief, the unborn child of Mary Doe can neither admit nor deny the allegations of paragraph 8 of said complaint.

8.

The unborn child of Mary Doe denies the allegations of paragraph 9 of said complaint.

9.

Answering paragraph 10 of said complaint, for want of information sufficient to form a belief, the unborn child of Mary Doe is unable to admit or deny the allegations of the first two paragraphs of paragraph 10 of said complaint and the first sentence of the third paragraph of paragraph 10 of said complaint. However, the remaining allegations of paragraph 10 of said complaint are specifically denied.

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10.

Answering paragraph 11 of said complaint, for want of information sufficient to form a belief, the unborn child of Mary Doe is unable to admit or deny the allegations [47] of the first two sentences of paragraph 11 of said complaint. The unborn child of Mary Doe denies the allegations of the last two sentences of paragraph 11 of said complaint.

11.

The unborn child of Mary Doe admits the allegations of paragraphs 12, 13 and 14 of said complaint.

12.

For want of information sufficient to form a belief, the unborn child of Mary Doe can neither admit nor deny the allegations of paragraph 15 of said complaint.

13.

The unborn child child of Mary Doe denies the allegations of paragraphs 16, 17, 18, 19, 20 and 21 of said complaint.

14.

Further answering said complaint and specifically paragraph 21 thereof, the unborn child of Mary Doe avers that plaintiffs have an adequate remedy at law insofar as concerns the alleged application of Mary Doe to the Abortion Committee of Grady Memorial Hospital to obtain an abortion in that they can appeal the alleged denial of that Committee to the Fulton Superior Court for the purpose of determining whether or not that Committee has acted illegally.

26

15.

Further answering said complaint, if Mary Doe does not wish to have children after the birth of this unborn child, she has an adequate remedy at law under the provisions of the Georgia "Voluntary Sterilization Act", Ga. Laws 1966, p. 453, Ga. Code § Ann. 84-931, et seq.

16.

COUNTER-CLAIM

Further answering said complaint, and by way of [48] counter-claim, the unborn child of Mary Doe avers as follows:

1.

The unborn child of Mary Doe is a legal person in contemplation of law and as such is entitled to the full protection of all laws of the United States and of the State of Georgia.

2.

The plaintiffs have conspired to deprive the unborn child of Mary Doe of life in violation of the following legal rights of the unborn child of Mary Doe:

(a) The right of the unborn child of Mary Doe under the Fourth Amendment to the United States Constitution to be secure in his person against unreasonable seizure.

(b) The right of the unborn child of Mary Doe under the Fifth Amendment of the United States Constitution not to be deprived of life without due process of law.

(c) The right of the unborn child of Mary Doe under the Sixth Amendment of the United States Consti-

tution to a trial by jury and an opportunity to confront witnesses against him.

(d) The rights of the unborn child of Mary Doe as guaranteed by the Ninth Amendment to the United States Constitution.

(e) The right of the unborn child of Mary Doe to due process and the equal protection of the law under the Fourteenth Amendment to the United States Constitution.

(f) The right of the unborn child of Mary Doe under the Eighth Amendment to the United States Constitution and Article I, Section I, Paragraph IX, of the Georgia Constitution of 1945 (Ga. Code Ann. § 2-109) not to have cruel and unusual punishment inflicted upon him.

[49]

(g) The right of the unborn child of Mary Doe under Article IX, Section I, Paragraph II, of the Georgia Constitution of 1945 (Ga. Code Ann. § 2-102) to the impartial and complete protection of his person by the state and local governments of the State of Georgia.

(h) The right of the unborn child of Mary Doe under Article I, Section I, Paragraph XVI of the Georgia Constitution of 1945 (Ga. Code Ann. § 2-116) to be secure in his person from unreasonable seizure.

(i) The right of the unborn child of Mary Doe under Article I, Section I, Paragraph III, of the Georgia Constitution of 1945 (Ga. Code Ann. § 2-103) not to be deprived of life except by due process of law.

(j) The right of the unborn child of Mary Doe

under Title 42, Section 1981, of the United States Code to the full and equal benefit of all laws and proceedings for the security of his person.

(k) The right of the unborn child of Mary Doe under Title 42, Section 1985, of the United States Code to be free from any conspiracy to deprive him of the equal protection of the laws of the United States and of the State of Georgia and the equal privileges and immunities under said laws.

(1) The right of the unborn child of Mary Doe to the protection of his person and all civil rights secured to him by the laws of the United States and the State of Georgia as provided in Title 42, Section 1988, of the United States Code.

3.

Plaintiffs Peter G. Bourne, Robert Hatcher, James Waters, Corbett Turner and Newton Long are acting in the [50] aforesaid conspiracy and in this action in their capacity as agents of Grady Memorial Hospital, and such action therefore constitutes state action.

4.

The unborn child of Mary Doe brings this action for himself and as representative of the class of unborn children.

5.

The unborn child of Mary Doe brings this action under Title 42, Section 1983, of the United States Code seeking an injunction against plaintiffs depriving him of the aforesaid rights, privileges and immunities.

The unborn child of Mary Doe avers that whether or not the Court upholds the validity of those provisions of Georgia law challenged in the plaintiffs' complaint, under the provisions of the common law of the State of Georgia he is entitled to life.

WHEREFORE, the unborn child of Mary Doe prays as follows:

- (a) That the prayers of plaintiffs' complaint be denied;
- (b) That plaintiffs be temporarily and permanently enjoined from conspiring to deprive the unborn child of Mary Doe of his civil rights.

/s/ FERDINAND BUCKLEY

Guardian ad Litem for the unborn
child of Mary Doe

[53]

(Filed in Clerk's Office May 5, 1970, Claude L. Goza,
Clerk; By: RMS, Deputy Clerk)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MARY DOE, et al,

Plaintiffs

vs.

ARTHUR K. BOLTON, et al,

Defendants

CIVIL ACTION
NO. 13676

ANSWER OF LEWIS R. SLATON,
DISTRICT ATTORNEY OF FULTON COUNTY

Comes now, Defendant, LEWIS R. SLATON, District Attorney of Fulton County, and files this answer to plaintiff's complaint and shows the court as follows:

FIRST DEFENSE

Said complaint fails to state a claim upon which relief can be granted to Mary Doe or to any of the other plaintiffs named in said complaint.

SECOND DEFENSE

Said complaint fails to state a claim for equitable relief in behalf of Mary Doe or any of the other plaintiffs named in said complaint.

THIRD DEFENSE

As to plaintiff, Mary Doe, said action is not being prosecuted in the name of a real party in interest as

required by Rule 17(a) of the Federal Rules of Civil Procedure.

FOURTH DEFENSE

Said complaint fails to join the father of the unborn [54] child of Mary Doe and therefore said complaint fails to join an indispensable party as required by Rule 19(a) of the Federal Rules of Civil Procedure.

FIFTH DEFENSE

Said complaint fails to show said Mary Doe complied with the provisions of Georgia Code Ann. § 26-1201, et seq. (sometimes referred to as the Georgia Abortion Act.).

1.

Respondent, Lewis R. Slaton, denies that plaintiffs are entitled to any relief sought in paragraphs 1 and 2 of said complaint, and specifically denies that any right of plaintiffs protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution is at issue in this action.

2.

Respondent denies that plaintiffs are entitled to the relief sought in paragraph 3 of said complaint.

3.

Respondent denies that plaintiffs are entitled to the relief sought in paragraph 4 of said complaint.

4.

Respondent denies the allegations of paragraph 5 of said complaint and specifically denies that plaintiffs are

entitled to the relief sought in paragraph 5 of said complaint.

5.

Respondent avers that for want of information sufficient [55] to form a belief, he is unable to admit nor deny the allegations of paragraph 6 of said complaint and demands strict proof thereof. In further answer, Respondent denies that it is necessary or proper for said plaintiff, Mary Doe, to conceal her identity from the court or Respondent. Respondent further shows that Mary Doe's identity is necessary for Respondent to properly prepare his defense to plaintiff's factual allegations.

6.

Respondent specifically denies the allegations of the last sentence of paragraph 7 of said complaint. For want of sufficient information to form a belief, Respondent is unable to admit nor deny the remaining allegations of said paragraph of said complaint.

7.

For want of information sufficient to form a belief, Respondent can neither admit nor deny the allegations of paragraph 8 of said complaint.

8.

Respondent specifically denies the allegations of paragraph 9 of said complaint.

9.

Respondent is unable to admit or deny the allegations of the first two paragraphs of paragraph 10 and the

first sentence of the third paragraph of paragraph 10 of said complaint for want of information sufficient to form a belief. Respondent specifically denies the remaining allegations of paragraph 10 of said complaint.

[56]

10.

Respondent is unable to admit or deny the allegations of the first two sentences of paragraph 11 of said complaint for want of information sufficient to form a belief. Respondent denies the remaining portions of paragraph 11 of said complaint.

11.

Respondent is unable to admit or deny the allegations of paragraph 12 of said complaint as worded, for want of information sufficient to form a belief.

12.

Paragraph 13 of said complaint is admitted.

13.

Respondent is unable to admit nor deny the allegations of paragraph 14 of said complaint, as worded, for want of sufficient information to form a belief.

14.

Respondent is unable to admit or deny the allegations of paragraph 15 of said complaint for want of sufficient information to form a belief.

15.

Respondent denies the allegations of paragraph 16, 17, 18, 19, 20, 21 and every sub-paragraph thereof of said complaint.

WHEREFORE, Respondent prays:

- a) That the prayers of plaintiff's complaint be denied;
- b) That the Respondent have such further relief as is just and equitable.

/s/ TONY H. HIGHT

**TONY H. HIGHT,
Assistant District Attorney,
Atlanta Judicial Circuit
OF COUNSEL FOR RESPONDENT**

[58]

(Filed in Clerk's Office May 6, 1970, Claude L. Goza,
Clerk; By: JAR, Deputy Clerk)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

MARY DOE, ET AL

Plaintiff

vs.

HERBERT T. JENKINS, as Chief
of Police of the City of
Atlanta, Georgia,

Defendant

Civil Case

No. 13676

**ANSWER OF DEFENDANT HERBERT T. JENKINS,
AS CHIEF OF POLICE OF THE CITY OF
ATLANTA, GEORGIA**

Defendant HERBERT T. JENKINS, as Chief of Police of the City of Atlanta, answers the Complaint in this action as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Complaint fails to state a claim upon which relief can be granted against this defendant.

THIRD DEFENSE

The Complaint fails to state a claim against this de-

fendant upon which relief can be granted under any provision of the First Amendment to the Constitution of the United States of America.

FOURTH DEFENSE

The Complaint fails to state a claim against this defendant upon which relief can be granted under any provision of the Fourth Amendment to the Constitution of the United States of America.

[59]

FIFTH DEFENSE

The Complaint fails to state a claim against this defendant upon which relief can be granted under any provision of the Fifth Amendment to the Constitution of the United States of America.

SIXTH DEFENSE

The Complaint fails to state a claim against this defendant upon which relief can be granted under any provision of the Ninth Amendment to the Constitution of the United States of America.

SEVENTH DEFENSE

The Complaint fails to state a claim against this defendant upon which relief can be granted under any provision of the Fourteenth Amendment to the Constitution of the United States of America.

EIGHTH DEFENSE

The Complaint fails to state a claim against this defendant upon which relief can be granted under any pro-

vision of the Eighth Amendment to the Constitution of the United States of America.

NINTH DEFENSE

The Complaint fails to state a claim against this defendant upon which relief can be granted under any provision of Title 42 USC Section 1983.

TENTH DEFENSE

The Complaint fails to state a claim against this defendant upon which relief can be granted under any provision of Title 28 USC Sections 2201 and 2202.

ELEVENTH DEFENSE

1.

This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in [60] paragraph 1 of the Complaint except that the law quoted therein is a part of the laws of the State of Georgia so far as defendant is informed and believes.

2.

This defendant denies any averment in paragraphs 2, 3, 4, 5, 7, 8, 9, 10, 11, 16, 17, 18, 19, 20 and 21 as to which a response from this defendant is required by any rule of law.

3.

This defendant denies any averment in paragraph 6 of the Complaint as to which a response from him is required. Defendant further states that the refusal of plaintiff to disclose her true identity in the pleadings

prevents this proceeding from being a case or controversy to which the jurisdiction of this court extends within the meaning of Article 3, Section 2, Clause 1 of the Constitution of the United States of America.

4.

Defendant admits the averments of paragraphs 12, 13 and 14 of the Complaint insofar as the names, titles and general duties of defendant and the other officers are concerned.

WHEREFORE, this defendant demands the court enter judgment against all plaintiffs with all costs taxed against plaintiffs.

/s/ HENRY L. BOWDEN

HENRY L. BOWDEN

/s/ RALPH H. WITT

2614 First National
Bank Bldg.
Atlanta, Georgia 30303
524-7731

RALPH H. WITT
Attorneys for Defendant
HERBERT T. JENKINS

[62]

(Filed in Clerk's Office May 6, 1970, Claude L. Goza,
Clerk; By: JAR, Deputy Clerk)

(Received May 6, 1970, Clerk's Office)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,

Plaintiffs

v.

ARTHUR K. BOLTON, et al.,

Defendants

CIVIL ACTION

NUMBER 13676

The court having heretofore appointed a guardian ad litem for the unborn foetus in the within matter and said guardian having filed an answer seeking affirmative relief by way of injunction against the plaintiffs.

Now, upon consideration, it appears that said appointment was improvidently entered in that said foetus is not entitled to representation by a guardian ad litem; at least not to the extent of being able to ask for affirmative relief. Cf. Ga. Code Ann. §26-1103; Ga. Code Ann. §26-1101; Biegun v. The State, 206 Ga. 618 (1950); White v. The State, 114 Ga. App. 437 (1966); Hunter v. The State, 29 Ga. App. 366 (1923); *contra*, Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504 (1956), and Note, *In Defense of the Right to Live: The Constitutionality of the Therapeutic Abortion*, 1 Ga. L. Rev. 693 at 705-706 (1967); see Babbitz v. McCann, 38 U.S.L.W. 2498 (E.D. Wis., Filed March 5, 1970).

Accordingly, said appointment is hereby revoked and set aside. However, the guardian is free to proceed as amicus curiae in the case now referred to a three-judge panel.

For the panel

IT IS SO ORDERED.

This the 5th day of May, 1970.

/s/ SIDNEY O. SMITH, JR.

SIDNEY O. SMITH, JR.
United States District Judge

[63]

(Filed in Clerk's Office May 11, 1970, Claude L. Goza,
Clerk; By: JAR, Deputy Clerk)

(Received May 11, 1970, Clerk's Office)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,

Plaintiffs

v.

ARTHUR K. BOLTON, as
Attorney General of the
State of Georgia, et al.,

Defendants

CIVIL ACTION

NO. 13676

MOTION TO DISMISS

Comes now Arthur K. Bolton, in his official capacity as Attorney General of the State of Georgia, and moves: (1) to be dismissed from the above-captioned suit as a party defendant in that it fails to state a claim upon which relief can be granted against him; (2) To be granted permission to file an amicus curiae brief in support of the constitutionality of the statutes of the State of Georgia attacked in said suit, *i.e.*, Criminal Code of Georgia, §§ 26-1201, 26-1202, 26-1203.

/s/ ARTHUR K. BOLTON

ARTHUR K. BOLTON
Attorney General

/s/ HAROLD N. HILL, JR.

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

/s/ MARION O. GORDON

MARION O. GORDON
Assistant Attorney General

Please Serve:
DOROTHY T. BEASLEY
P. O. Address:

/s/ DOROTHY T. BEASLEY

132 Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

DOROTHY T. BEASLEY
Assistant Attorney General

[64]

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

MARY DOE, et al.,

Plaintiffs

v.

ARTHUR K. BOLTON, as
Attorney General of the
State of Georgia, et al.,

Defendants

CIVIL ACTION

NO. 13676

**BRIEF IN SUPPORT OF MOTION TO DISMISS
FACTS:**

"Arthur K. Bolton, as Attorney General of the State of Georgia", is named as a party defendant in the above-styled action. It is alleged in the Complaint that "he is charged with the State-wide enforcement and administration of the challenged statutes." (Complaint, Par. 12). This is the only basis given for joining him.

The suit challenges the constitutionality of that portion of the Criminal Code of Georgia which deals with abortion, *i.e.*, Sections 26-1201 through 26-1203. It prays for a declaration of unconstitutionality and an injunction against enforcement and application of the subject statutes.

ARGUMENT:

It is submitted that none of the various forms of relief prayed for by plaintiffs can be awarded against the Attorney General of Georgia. That being so, as will be further explained below, the suit does not lie against

him and, therefore, it is respectfully urged that he be dismissed as a party defendant.

The Attorney General is not charged generally with the enforcement, application, or administration of the criminal [65] statutes of this State. He is an elected executive officer of the State. Constitution of the State of Georgia of 1945, Art. V, § II, Par. I; Art. VI, § X, Par. I (Ga. Code § 2-3101, § 2-4501). As such, certain of his duties are enumerated in the Constitution;

"It shall be the duty of the Attorney General to act as the legal adviser of the Executive Department, to represent the State in the Supreme Court in all capital felonies; and in all civil and criminal cases in any court when required by the Governor and to perform such other services as shall be required of him by law." Constitution, *supra*, Art. VI, § X, Par. II (Ga. Code § 2-4502).

In addition to these duties, the authority of the Attorney General is prescribed as follows:

"The General Assembly shall have power to prescribe the duties, authority, and salaries of the executive officers," Constitution, *supra*, Art. V, § II, Par. I (Ga. Code § 2-3102).

Pursuant to the Constitutional mandate, numerous duties have been prescribed, none of which involve the enforcement or administration of the criminal laws here subject. Georgia Code, Ch. 40-16 contains the bulk of them. Thus, in addition to the statutorily listed duties required by the Governor (Ga. Code § 40-1602), the Department of Law, of which the Attorney General is the head, is vested with complete and exclusive authority in matters of law relating to the Executive Branch of the State government. Ga. Laws 1966, pp. 43-45; Ga. Code Ann.

§ 40-1612, -1614. As chief legal officer of the State, [66] the Attorney General has only limited, clearly proscribed authority and power to prosecute certain criminal cases. Ga. Laws 1943, pp. 284, 286-287 (Ga. Code Ann. § 40-1616, -1619). Nowhere is there a general blanket authority to prosecute all types of criminal cases, which would include those arising under the statutes here subject.

That duty is delegated to the district attorneys, as representatives of the State. Constitution, *supra*, Art. VI, § XI, Par. II (Ga. Code Ann. § 2-4602). It is therefore his duty: ". . . (4) to draw up all indictments or presentments, when requested by the grand jury, and to prosecute all indictable offenses." Ga. Code § 24-2908. It is only in cases of emergency, when a district attorney "is absent or indisposed, or disqualified from interest or relationships to engage in a prosecution," that the Attorney General, among others, may serve in the place of the district attorney. Ga. Code § 24-2913; § 40-1603. That, of course, is not the situation here.

The combination of specific constitutional and statutory provisions defines the boundaries of the Attorney General's authority and duties. ". . . (W)here the Constitution creates an office and prescribes the duties of the holder thereof, and declares that other duties may be imposed on him by statute, he has no authority to perform any act not legitimately within the scope of such statutory and constitutional provisions." *Walker ex rel. Mason v. Georgia Railway and Power Company*, 146 Ga. 655 (1917); *State ex rel. Boykin v. Ball Investment Company*, 191 Ga. 382, 387 (1940); *Boykin v. Martocello*, 194 Ga. 867, 870 (1942); *Board of Commissioners v. Clay*, 214 Ga. 70, 73 (1958). Thus, the Attorney Gen-

eral has no power or authority to determine who is to be prosecuted for an alleged offense under the criminal abortion statutes, nor can he as a part of his official [67] duties enforce, administer, or apply those statutes except in the limited instances referred to above.

It is also pointed out that the district attorneys are not his agents but are elected by the people and are answerable to them. Constitution, *supra*, Art. VI, § XI, Par. I (Ga. Code § 2-4601). The district attorneys are independent of the Attorney General, who therefore has no control over them as to prosecutions under the subject criminal statutes; nor do they act under his supervision or his direction. Neither does he have any authority or power to direct the chief of police as his agent.

Inasmuch as none of the relief prayed for can be directed against the Attorney General, he is an improper party defendant and should hence be dismissed as a party defendant.

Inasmuch, however, as the procedure contained in 28 U.S.C. § 2284 has been called into operation by the plaintiffs' assertion of the necessity of a three-judge court pursuant to 28 U.S.C. § 2281, the Attorney General respectfully requests permission to appear as *amicus curiae* with respect to the defense of the State statutes' constitutional validity.

Respectfully submitted,

/s/ ARTHUR K. BOLTON

ARTHUR K. BOLTON
Attorney General

/s/ HAROLD N. HILL, JR.

HAROLD N. HILL, JR.
Executive Assistant
Attorney General

/s/ MARION O. GORDON

MARION O. GORDON
Assistant Attorney General

Please Serve:
DOROTHY T. BEASLEY
P. O. Address:

/s/ DOROTHY T. BEASLEY

132 Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

DOROTHY T. BEASLEY
Assistant Attorney General

[69]

(Filed in Clerk's Office May 13, 1970, Claude L. Goza,
Clerk; By: RMS, Deputy Clerk)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,

Plaintiffs

v.

ARTHUR K. BOLTON, et al.,

Defendants

CIVIL ACTION

NO. 13676

**MOTION FOR RECONSIDERATION OF ORDER
REVOKING APPOINTMENT OF GUARDIAN
AD LITEM OF UNBORN FOETUS**

Comes now the undersigned, appearing as amicus curiae, and moves the Court to reconsider and revoke its Order of May 5, 1970, revoking appointment of the undersigned as guardian ad litem for the unborn foetus of Mary Doe upon the following grounds:

1.

It is alleged in the complaint that at the time of filing the complaint Mary Doe was nine weeks pregnant. Mrs. Hames, of counsel for Mary Doe, has stated to the undersigned that the aforesaid allegation was mistaken and that Mary Doe has been pregnant for approximately four to five weeks longer than alleged in the complaint. Thus, the foetus is now between sixteen and one-half weeks and seventeen and one-half weeks old.

2.

It is probable that the foetus is now quick as a matter of law, but if this is not the case, it is at least a question of fact whether or not the foetus is quick and the vast preponderance of the evidence would demand a finding that it is is.

[70]

3.

There is no party present before the Court who is representing the interests of the foetus.

4.

If the guardian ad litem filed a claim for affirmative relief which should not have been filed in behalf of the foetus, the Court can correct any error in that regard without depriving the foetus of representation by a guardian ad litem.

WHEREFORE, the undersigned prays that said Order of May 5, 1970, be revoked and that the undersigned or some other qualified person be appointed guardian ad litem for the foetus.

/s/ FERDINAND BUCKLEY

Amicus Cuaiae

[100]

(Filed in Clerk's Office Jun 2, 1970, Claude L. Goza,
Clerk; By: JWE, Deputy Clerk)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,

Plaintiffs

v.

ARTHUR K. BOLTON, et al.,

Defendants

CIVIL ACTION

NO. 13676

MOTION OF FERDINAND BUCKLEY TO
INTERVENE

Comes now Ferdinand Buckley, who respectfully requests this Court for leave to intervene in the above styled action on behalf of the unborn child of Mary Doe and on behalf of all unborn children in the State of Georgia who are or might be affected by a judgment in the above styled action upon the following grounds:

1.

Plaintiffs have filed an action in behalf of themselves and as representatives of the several classes to which they belong, claiming that the abortion laws of the State of Georgia adversely affect them and their respective classes and are violative of the United States Constitution.

2.

Each of the named defendants is allegedly charged with the duty of enforcing the abortion laws under attack.

3.

Neither the unborn child of Mary Doe nor any of the unborn children who are or might be affected by a judgment in this case have been named defendants in this case, and no one purports to represent the unborn child [101] of Mary Doe or the class of unborn children in general who are or might be affected by a decision in this case.

4.

The granting of the relief prayed for in the plaintiffs' complaint would deprive the unborn child of Mary Doe and other children similarly situated of their lives and liberty without due process of law and without the actual protection of the law in violation of the United States Constitution.

5.

The granting of the relief prayed for in plaintiffs' complaint would subject the unborn child of Mary Doe and other children similarly situated to cruel and unusual punishment in violation of the United States Constitution.

6.

The granting of the relief prayed for in plaintiffs' complaint would deprive the unborn child of Mary Doe and other children similarly situated of their civil rights in violation of Title 42, §§ 1981, 1985 and 1988 of the United States Code.

7.

The number of the members of the class which movant seeks to represent in this litigation is so large that the joinder of all members of the class would be impractical if not impossible. There are questions of law and fact in

this case which will determine the rights of every member of this class to life and liberty.

8.

Your movant will fairly, adequately and aggressively protect the interests of each member of this class, and movant therefore requests appointment as guardian ad [102] litem for and on behalf of the unborn child of Mary Doe and other unborn children in the State of Georgia.

9.

The class of unborn children will be irreparably injured if intervention is not allowed by this Court.

10.

While movant has been granted by the court leave to participate in the action as an amicus curiae, the rights of the class which movant seeks to represent will not be adequately protected unless movant is permitted to participate fully, as representative of a party in every phase of the action.

WHEREFORE, movant respectfully requests leave to intervene in this action in behalf of the unborn child of Mary Doe and other unborn children similarly situated, and for such other relief as this Court may deem appropriate.

/s/ FERDINAND BUCKLEY

FERDINAND BUCKLEY,
Movant

[114]

(Filed in Clerk's Office Jun 8, 1970, Claude L. Goza,
Clerk; By: JAR, Deputy Clerk)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, ET AL,

Plaintiffs

vs.

ARTHUR K. BOLTON, ET AL,

Defendants

CASE

NO. 13676

MOTION TO DISMISS AS TO MARY DOE

Now comes LEWIS R. SLATON, Defendant and
moves this court to dismiss the petition of Mary Doe and
shows the court as follows:

1.

The Plaintiff's petition shows a complete failure to
comply with and exhaust state administrative procedures.

2.

An adequate State remedy exists.

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3.

The Georgia State courts should have the initial opportunity to decide the constitutionality of a State law.

Respectfully submitted,

/s/ LEWIS R. SLATON

LEWIS R. SLATON,
District Attorney
Atlanta Judicial Circuit

/s/ TONY H. HIGHT

Fulton County
Courthouse

Atlanta, Ga. 30303

TONY H. HIGHT,
Assistant District Attorney,
Atlanta Judicial Circuit

[120]

(Filed in Clerk's Office Jun 8, 1970, Claude L. Goza,
Clerk; By: JAR, Deputy Clerk)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,

Plaintiffs

vs.

ARTHUR K. BOLTON, et al.,

Defendants

CASE

NO. 13676

**DEFENDANT, LEWIS R. SLATON'S
INTERROGATORIES TO PLAINTIFF, MARY DOE**

I herewith serve upon you the following interrogatories pursuant to the provisions of Rule 31 of the Federal Rules of Civil Procedure (28 USCA).

INTERROGATORY 1

List the names of medical doctors that have examined Mary Doe concerning her current alleged pregnancy giving the date and place of each examination performed by said doctor.

INTERROGATORY 2

Is petitioner's (Mary Doe) husband living with petitioner?

INTERROGATORY 3

If the answer to interrogatory 2 is in the affirmative, give her husband's name and place of employment.

INTERROGATORY 4

Has Mary Doe or her husband ever been convicted of a crime?

[121]

INTERROGATORY 5

If the answer to interrogatory 4 is affirmative, list the convictions of either or both.

INTERROGATORY 6

Was the application of Mary Doe for an abortion denied in writing by the alleged Grady Hospital Abortion Committee?

INTERROGATORY 7

If the answer to interrogatory 6 is negative, what representative of Grady Hospital notified said Mary Doe of said denial?

INTERROGATORY 8

Was the consent of the husband of Mary Doe to an abortion presented in writing to the Grady Hospital Abortion Committee?

INTERROGATORY 9

Did three physicians certify in writing that based upon their separate personal examinations of the pregnant woman, the abortion was necessary as required under Ga. Code Ann. § 26-1202?

INTERROGATORY 10

If the answer to interrogatory 9 is affirmatively list the physicians' names and date of such certification.

INTERROGATORY 11

List the hospitals that Mary Doe has made a formal application for an abortion.

INTERROGATORY 12

State whether the medical doctors examinations indicated in interrogatory 1 was charitable or whether compensation was paid therefor.

[122]

INTERROGATORY 13

Was the application of said Mary Doe to Grady Memorial Hospital Abortion Committee for an abortion, a request for a charitable abortion at the taxpayer's expense.

INTERROGATORY 14

If the previous answer of interrogatory 12 was, Examinations were not charitable, indicate the amount paid to each physician.

Third Floor /s/ TONY H. HIGHT

Fulton County
Courthouse

Atlanta, Ga. 30303

Counsel for Defendant,
Lewis R. Slaton

[123]

(Filed in Clerk's Office Jun 8, 1970, Claude L. Goza,
Clerk; By: JAR, Deputy Clerk)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al,	} CASE
<i>Plaintiffs</i>	
vs	
ARTHUR K. BOLTON, et al,	} NO. 13676
<i>Defendants</i>	

MOTION TO DISMISS AS TO PETER G. BOURNE;
ROBERT HATCHER; LILLAS L. JAMES; JAMES
WATERS; CORBETT TURNER; NEWTON LONG;
EDWARD LEADER; WILLIAM H. BIGGERS;
GEORGE VIOLIN; PATRICIA S. SMITH; JENNIE
WILLIAMS; JUDITH BOURNE, SUZANNE DUNA-
WAY; JOYCE PARKS; LOU ANN IRION; MARY
LONG; J. EMMETT HERNDON; SAMUEL L. WIL-
LIAMS; EUGENE PICKETT; RICHARD DEVOR;
DONALD DAUGHTRY; JUDITH ZORACH and
KAREN WEAVER, residents of the State of Georgia;
PLANNED PARENTHOOD ASSOCIATION OF AT-
LANTA, INC., a Georgia Corporation; and GEORGIA
CITIZENS FOR HOSPITAL ABORTION, INC., a
Georgia Corporation, for and on behalf of all persons
and organizations similarly situated.

Now comes LEWIS R. SLATON, Defendant and
moves this court to dismiss the above parties as plain-

tiffs in the above styled case and shows the court as follows:

1.

Peter G. Bourne; Robert Hatcher; Lillas L. James; James Waters; Corbett Turner; Newton Long; Edward Leader; William H. Biggers; George Violin; Patricia S. Smith; Jennie Williams; Judith Bourne; Suzanne Dunaway; Joyce Parks; Lou Ann Irion; Mary Long; J. Emmett Herndon; Samuel L. Williams; Eugene Pickett; Richard Devor; Donald Daughtry; Judith Zorach and Karen Weaver, residents of Georgia; Planned Parenthood Association of Atlanta, Inc., a Georgia Corporation; and Georgia Citizens for Hospital Abortion, Inc., a Georgia Corporation, for and on behalf of all persons and organizations similarly situated, do not have an enforceable interest.

[124]

2.

Peter G. Bourne; Robert Hatcher; Lillas L. James; James Water; Corbett Turner; Newton Long; Edward Leader; William H. Biggers; George Violin; Patricia S. Smith; Jennie Williams; Judith Bourne; Suzanne Dunaway; Joyce Parks; Lou Ann Irion; Mary Long; J. Emmett Herndon; Samuel L. Williams; Eugene Pickett; Richard Devor; Donald Daughtry; Judith Zorach and Karen Weaver, residents of Georgia; Planned Parenthood Association of Atlanta, Inc., a Georgia Corporation; and Georgia Citizens for Hospital Abortion, Inc., a Georgia Corporation, for and on behalf of all persons and organizations similarly situated, are not proper parties

which present ill-defined controversies of constitutional issues which are hypothetical or abstract in character.

Respectfully submitted,

/s/ LEWIS R. SLATON

LEWIS R. SLATON,
District Attorney
Atlanta Judicial Circuit

/s/ TONY H. HIGHT

Third Floor

Fulton County
Courthouse
Atlanta, Ga. 30303

TONY H. HIGHT,
Assistant District Attorney,
Atlanta Judicial Circuit

COUNSEL FOR DEFENDANTS

[130]

(Filed in Clerk's Office Jun 8, 1970, Claude L. Goza,
Clerk; By: JAR, Deputy Clerk)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,

Plaintiffs

vs

ARTHUR K. BOLTON, et al.,

Defendants

CASE

NO. 13676

DEFENDANT, LEWIS R. SLATON'S INTERROGA-
TORIES TO PLAINTIFFS PETER G. BOURNE;
ROBERT HATCHER; LILLAS L. JAMES; JAMES
WATERS; CORBETT TURNER; NEWTON LONG;
EDWARD LEADER; WILLIAM H. BIGGERS;
GEORGE VIOLIN; PATRICIA S. SMITH; JEN-
NIE WILLIAMS; JUDITH BOURNE; SUZANNE
DUNAWAY; JOYCE PARKS; LOU ANN IRION;
MARY LONG; J. EMMETT HERNDON; SAMUEL L.
WILLIAMS; EUGENE PICKETT; RICHARD DE-
VOR; DONALD DAUGHTRY; JUDITH ZORACH and
KAREN WEAVER, residents of the State of Georgia;
PLANNED PARENTHOOD ASSOCIATION OF AT-
LANTA, INC., a Georgia Corporation; and GEORGIA
CITIZENS FOR HOSPITAL ABORTION, INC., a
Georgia Corporation, for and on behalf of all persons
and organizations similarly situated.

I herewith serve upon you the following interrogatory

pursuant to the provisions of Rule 31 of the Federal Rules of Civil Procedure (28 USCA).

INTERROGATORY 1

State whether or not each of you are represented by Attorneys, Margie Pitts Hames, Tobiane Schwartz, Elizabeth Rindskopf, and Betty Kehrler, as indigent persons qualified for legal aid services.

Third Floor, /s/ TONY H. HIGHT

Fulton County
Courthouse

Atlanta, Ga. 30303

Counsel for Defendant,
Lewis R. Slaton

[465]

(Filed in Clerk's Office Jun 15, 1970, Claude L. Goza,
Clerk; By: JWE, Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
OF THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al,

Plaintiffs,

Vs.

Arthur K. Bolton, et al,

Defendants.

CIVIL CASE

NO. 13676

ANSWERS TO INTERROGATORIES

Comes now Plaintiff Mary Doe and makes the following responses to Interrogatories propounded by defendant Lewis R. Slaton and served upon my attorney on June 10, 1970.

INTERROGATORY NO. 1: I do not remember the names and specific dates of all doctors that have examined me concerning my pregnancy. I do recall that I went to Grady Memorial Hospital on or about March 15 or 16, 1970. I remember being seen by a Dr. White and a Dr. Butler. In late April, 1970, I was examined by Dr. Donald Block and a Dr. Bourn. I saw another doctor but do not recall his name. I saw Dr. Block at his office and Dr. Bourn at the Southside Comprehensive Medical Center. The other doctor was at Lenox Towers.

INTERROGATORY NO. 2: My husband and I are now separated.

INTERROGATORY NO. 3: No response required.

INTERROGATORY NO. 4: I object to answering this question because any conviction of crime is completely irrelevant to My right to an abortion.

INTERROGATORY NO. 5: I object to answering this interrogatory for the same reason.

INTERROGATORY NO. 6: The denial of my application by Grady Memorial Hospital was not in writing.

[466] **INTERROGATORY NO. 7:** My recollection is that I was notified by a doctor from Grady, Dr. Butler, as I recall.

INTERROGATORY NO. 8: My husband and I were separated at the time I applied for the abortion at Grady.

INTERROGATORY NO. 9: Yes, to the best of my knowledge.

INTERROGATORY NO. 10: I do not have copies of the certifications made by the physicians.

INTERROGATORY NO. 11: My application for abortion was denied by Grady Memorial Hospital, on or about April 10, 1970. Georgia Baptist Hospital, Atlanta, Georgia, approved my application on May 5, 1970.

INTERROGATORY NO. 12: I am an indigent person qualified for medical services at Grady Memorial Hospital. I do not have the money to pay my doctors. I was not approved as a charity patient at Georgia Baptist Hospital and I did not have the money to pay for the abortion there.

INTERROGATORY NO. 13: I am unemployed, have no income, receive no support from my husband

and do not yet qualify for welfare assistance. I do qualify, so I am advised, for free medical services at Grady Memorial Hospital. I received one emergency check from the Welfare department in an amount under \$20.00.

/s/ MARY DOE

MARY DOE

STATE OF GEORGIA
COUNTY OF FULTON

Personally appeared before me, the undersigned Notary Public in and for said County and State, the said Mary Doe who made oath that she was the person so identified in the suit Mary Doe, et al, vs. Arthur K. Bolton, et al, and that her true identity is revealed in an affidavit attached to the complaint filed with the court in a sealed container, and further that the above and foregoing responses to interrogatories are true and correct to the best of her knowledge, information and belief.

This 14th day of June, 1970.

/s/ MARGIE PITTS HAMES

Notary Public

My Commission expires: Aug. 24, 1973

[468]

(Filed in Clerk's Office Jun 15, 1970, Claude L. Goza,
Clerk; By: JWE, Deputy Clerk)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al,

Plaintiffs

VS

ARTHUR K. BOLTON, et al,

Defendants

CIVIL ACTION

NO. 13676

**MOTION FOR AN ORDER REQUIRING THE
DISCLOSURE OF THE IDENTITY OF MARY DOE
SO THAT THE NAMED DEFENDANTS MAY
PROPERLY PREPARE THEIR DEFENSE**

Now comes, LEWIS R. SLATON, District Attorney
of Fulton County and moves this Court to require the
identity of plaintiff, Mary Doe be revealed to the named
defendants so that a proper defense to the allegations of
the petition may be conducted.

Respectfully submitted,

/s/ TONY H. HIGHT

TONY H. HIGHT,
Assistant District Attorney,
Atlanta Judicial Circuit

COUNSEL FOR DEFENDANT
LEWIS R. SLATON

[469]

(Filed in Clerk's Office Jun 15, 1970, Claude L. Goza,
Clerk; By: JWE, Deputy Clerk)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al,

Plaintiffs

VS

ARTHUR K. BOLTON, et al,

Defendants

} CIVIL ACTION

} NO. 13676

**MOTION FOR A PHYSICAL AND MENTAL
EXAMINATION OF THE PLAINTIFF MARY DOE**

Now comes the Defendant, LEWIS R. SLATON, District Attorney of Fulton County and moves that the Court order a mental and physical examination of Plaintiff, Mary Doe.

Defendant, Lewis R. Slaton, shows the Court as follows:

1.

The allegations of the Petition of Mary Doe shows that she suffers from a serious mental condition and may be unable to give her consent to an abortion.

2.

Due to the allegations of Plaintiff's Petition, a Guardian Ad Litem may be required to protect the interest of the Petitioner, Mary Doe.

3.

The Defendants are placed in the position of having to accept the allegations of the Petition as to whether said Mary Doe is in fact pregnant and the time that has elapsed since conception as estimated by the attorney for said Mary Doe, who is certainly not a medical expert.

[470]

4.

The Defendant is unable to adequately prepare a defense to the allegations of the Petition without such an examination.

WHEREFORE, the Respondent prays that said Mary Doe be required to be examined by medical experts selected either by the court or the defendant.

/s/ TONY H. HIGHT

TONY H. HIGHT,
Assistant District Attorney,
Atlanta Judicial Circuit

Fulton County
Courthouse

COUNSEL FOR DEFENDANT,
Atlanta, Ga. 30303 LEWIS R. SLATON

[471]

(Filed in Clerk's Office Jun 15, 1970, Claude L. Goza,
Clerk; By: JWE, Deputy Clerk)

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al,

Plaintiffs

VS

ARTHUR K. BOLTON, et al,

Defendants

} CIVIL ACTION

} NO. 13676

MOTION FOR A CONTINUANCE

Now comes LEWIS R. SLATON, District Attorney of Fulton County and requests that this Court grant a continuance for a reasonable time after the identity of the Plaintiff, Mary Doe, is disclosed in order that the defendants may properly prepare a defense to the allegations in said Petition.

Defendant, Lewis R. Slaton, shows the court:

1.

That the plaintiffs have refused to disclose the identity of said Mary Doe which has hampered and rendered impossible an adequate investigation by the defendants;

2.

That the Defendants have been unable to obtain a deposition from Mary Doe by the avowed refusal of the plaintiffs to disclose her identity;

3.

That the Defendants have been unable to obtain a mental and physical examination of said Mary Doe by her avowed refusal to disclose her identity;

[472]

4.

That the Defendant, Lewis R. Slaton, has been denied the right to be confronted by a real person whose identity is known to him in order to properly prepare his sundry defense.

WHEREFORE, the Defendant respectfully requests a continuance for a reasonable time after the disclosure of the identity of Mary Doe, in order to properly prepare his defense and defend his person under due process of law.

/s/ TONY H. HIGHT

Fulton County
Courthouse
Atlanta, Ga. 30303

TONY H. HIGHT,
Assistant District Attorney,
Atlanta Judicial Circuit
COUNSEL FOR DEFENDANT,
LEWIS R. SLATON

[604]

(Filed in Clerk's Office Jul 31, 1970, Claude L. Goza,
Clerk; By: JAR, Deputy Clerk)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al,

Plaintiffs

vs.

ARTHUR K. BOLTON, as
Attorney General of the
State of Georgia;

LEWIS R. SLATON, as District
Attorney of Fulton County,
Georgia; and HERBERT T.
JENKINS, as Chief of Police
of the City of Atlanta,

Defendants

CIVIL ACTION
NUMBER 13676

PER CURIAM.

This is an action for declaratory and injunctive relief brought pursuant to 28 U.S.C.A. §2201 and 2202, and 42 U.S.C.A. §1983 and 28 U.S.C.A. §1343. It is a class action attacking Ga. Code Ann. §26-1201, *et seq.* (1969) Georgia's "Abortion Act."

Plaintiffs claim to represent four sub-classes: pregnant women, single or married, wishing legal abortions; licensed physicians who wish to perform or counsel performance of legal abortions; registered nurses who desire to participate in performing or counsel performance of legal abortions; and ministers and social workers who

wish to be free to advise abortion in counselling pregnant women.

Plaintiffs seek an order declaring Georgia's Abortion Statute unconstitutional and enjoining its enforcement on various grounds:

(1) the Statute is unconstitutionally vague and indefinite on its face and as applied, failing to provide sufficient [605] warning of the conduct proscribed, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

(2) Georgia's Abortion Statute unconstitutionally abridges a woman's right to decide to terminate an unwanted pregnancy, in restricting that fundamental liberty without an overriding compelling state interest;

(3) the Statute unconstitutionally restricts the right of the physicians, nurses, ministers and social workers to practice their professions;

(4) Georgia's Abortion Statute produces discrimination against poor and non-white women in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

PENDING MOTIONS

Arthur K. Bolton, sued in his official capacity as Attorney General of Georgia has moved for an order dismissing the claim against him on the ground that no relief could be granted against him since he is not charged generally with the enforcement, application or administration of the Georgia criminal statutes.

As plaintiffs observe, Article VI, § X, Par. II of the Georgia Constitution, Ga. Code Ann. §2-4502 (1933)

requires the Attorney General to represent the State in any civil or criminal case when required by the Governor. Furthermore, he may be required to give the Governor advisory opinions on the abortion statute. Ga. Code Ann. §40-1602 (1933). Finally, the Attorney General is head of the Department of Law, which is vested with [606] authority and jurisdiction in all matters of law relating to governmental departments, boards and agencies. Ga. Code Ann. §40-1614 (1943). The Attorney General has sufficient connection with enforcement of the statutes attacked to justify retaining him as a party.¹ See *Arneson v. Denny*, 25 F.2d 993 (W.D. Wash. 1928); *Jackson v. Colorado*, 294 F. Supp. 1065, 1072 (D. Colo. 1968); *James v. Almond*, 170 F. Supp. 331, 341-342 (E.D. Va. 1959); *International Longshoremen's & W. U. v. Ackerman*, 82 F.Supp. 65, 124 (D. Haw. 1948), *rev'd* on other grounds 187 F.2d 860 (9th Cir. 1951); *Revins v. Prindable*, 39 F. Supp. 708, 710 (E.D. Ill. 1941). Accordingly, that motion is denied.

The Attorney General has also objected to interrogatories which plaintiffs served for answer by a witness, Roger Rochat, M.D. In view of the disposition of this case made below, no ruling on this motion is necessary.

The motion of Ferdinand Buckley, Esquire, for reconsideration of the revocation of his appointment as guardian ad litem will be dealt with in connection with the discussion under MERITS below.

The motion of the National Legal Program on Health Problems of the Poor to submit a brief as *amicus curiae* is granted.

¹The Court is also aware that the Attorney General regularly interprets State criminal laws and decisions in published opinions and circulars to State judges and law enforcement officers.

The defendant Lewis R. Slaton, District Attorney of Fulton County, filed motions seeking orders requiring disclosure of plaintiff's identity, granting a continuance for discovery for a reasonable time thereafter, and requiring plaintiff to submit to a [607] physical and mental examination. In view of the reasons for which it is held that the complaint of this plaintiff presented a justiciable controversy, these motions are directed toward obtaining information which is not relevant to the case. Accordingly, they are denied.

JURISDICTION

A. *Substantial Constitutional Question.*

A three-judge court was convened pursuant to 28 U.S.C.A. §2281 and 2284. Such action is proper where plaintiffs attack the constitutionality of a state statute, raising a substantial constitutional question, and seek equitable relief against its enforcement. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962).

Plaintiffs here attack the constitutionality of Ga. Code Ann. §26-1201 *et seq.* (1969) on the grounds that it infringes rights protected by various Amendments to the United States Constitution. They seek an injunction against enforcement. In light of recent cases on the subject of the Constitutional right to an abortion, this Constitutional question appears substantial. *See Roe v. Wade*, ____ F. Supp. ____ (N.D. Tex., No. 3-3690-B, June 17, 1970); *Doe v. Randall*, ____ F. Supp. ____ (D. Minn., No. 3-70-Civ.-97, May 19, 1970); *Doe v. Scott*, ____ F. Supp. ____ (N.D. Ill., No. 70-C-395, March 27, 1970); *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970);

United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969), *app. docketed*, No. 1155 (February 5, 1970); California v. Belous, 71 Cal. 2d 991, 458 P.2d 194 (1969), *cert. den.* 397 U. S. 915 (1970).

[608]

B. *Justiciability.*

Standing

By motion to dismiss, Lewis R. Slaton, District Attorney of Fulton County, contends that all plaintiffs other than Mary Doe lack standing to maintain this action. The basis for the claims of these plaintiffs is that because they are not free to perform or counsel the obtaining of abortions, they are unconstitutionally restricted in the practice of their professions.

There are certainly instances in which any of these plaintiffs would have standing to claim a constitutional right to practice his profession, and infringement thereof. For instance, few would dispute that a social worker being prosecuted for conspiracy because he (or she) counselled obtaining an abortion, and referred the client to a physician for the abortion, would have standing to seek a declaratory judgment of his (or her) asserted constitutional right and infringement thereof. *See Griswold v. Connecticut*, 381 U. S. 479 (1965).

But absent prosecution or indictment, that these plaintiffs do have standing is more difficult to see. Whether their claim is otherwise justiciable is irrelevant. *Flast v. Cohen*, 392 U. S. 83, 100 n. 21 (1968). The sole issue is whether there is a logical link between the status they assert (physician, nurse) and the claim they seek adjudicated, or between their status and both the type of enact-

ment attacked and the nature of the constitutional infringement alleged. 392 U. S. at 102.

Under either test, all the plaintiffs have standing. As physicians, nurses, ministers or social workers they attack a [609] criminal statute potentially applicable to them, on the grounds that it unconstitutionally restricts their right to practice. Accordingly, the motion to dismiss for lack of standing is denied.

Collision of Interests

Article III of the United States Constitution limits the jurisdiction of the federal courts to cases and controversies. And it is well established that in actions for declaratory judgments, a District Court may not render an advisory opinion on the constitutionality of a state statute. Rather there must be "exigent adversity," an actual controversy in which the constitutionality of the statute is drawn into question in a truly adversary context. *See* *Golden v. Zwickler*, 394 U. S. 103, 108 (1969); *Poe v. Ullman*, 367 U. S. 497 (1961); *United Public Workers of America v. Mitchell*, 330 U. S. 75, 89 (1947).

Most akin to the instant case is *Poe v. Ullman*, 367 U. S. 497 (1961). There, a married couple, a married woman and their physician sought a declaratory judgment that Connecticut's statutes prohibiting the use of contraceptive devices and the giving of medical advice in the use of such devices violated plaintiffs' Fourteenth Amendment rights, depriving them of life and liberty without due process of law. None of the plaintiffs had been indicted or prosecuted under the statutes. There had been only one recorded prosecution for violation of the

statutes in the seventy-five years since their enactment, and that single instance occurred twenty years before the declaratory judgment action was brought. The Supreme Court suggested that the lack of a pending prosecution or immediate threat of such prosecution against the particular plaintiffs made the claims non-justiciable, [610] citing *United Public Workers of America v. Mitchell*, 330 U. S. 75 (1947). 367 U. S. at 501. But the Justices went on to find that the lack of recorded prosecutions, the unchallenged, open, ubiquitous public sales of contraceptive devices showed a deeply embedded State policy against enforcement, amounting to a tacit agreement not to prosecute violators of the statutes. The majority therefore held:

"It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting." 367 U. S. at 507.

However, these three cases seem precedent for the proposition that in the absence of a pending or threatened indictment or prosecution of the particular plaintiffs bringing a declaratory judgment action, a federal court cannot consider the constitutionality of the challenged criminal statute.

However in 1968, the Supreme Court decided *Epperson v. Arkansas*, 393 U. S. 97 (1968), in which a public school teacher argued that the Arkansas statute prohibiting the teaching of evolution was unconstitutional. There was no pending or threatened indictment or prosecution against the teacher. There was no record of any prosecutions under the challenged statute. The teacher's

dilemma was solely that (1) the new biology textbooks she was supposed to use in the approaching term contained a chapter on evolution, and (2) her action for a declaratory judgment in state court, granted on the trial level, had been reversed by [611] the Arkansas Supreme Court. The United States Supreme Court majority reached the merits and reversed the decision of the Arkansas Supreme Court in an opinion which summarily brushed aside the question of justiciability. 393 U. S. at 101-102. Apparently, then, the majority felt that the appeal presented a "substantial controversy . . . of sufficient immediacy and reality." *Golden v. Zwickler*, 394 U. S. 103, 108 (1969).

In the instant case, the plaintiff Mary Doe alleges that having properly applied to the Abortion Committee of Grady Memorial Hospital for a legal therapeutic abortion allowed by Ga. Code Ann. §26-1202 (1969), she was denied an abortion solely on the grounds that her present situation did not come within the terms of Ga. Code Ann. §26-1202(a)(1)(1969).

Georgia's Abortion Act defines a criminal abortion as the act performed by a person who administers a substance or uses an instrument or other means with intent to produce a miscarriage or abortion. Ga. Code Ann. §26-1201 (1969). However, Ga. Code Ann. §26-1202(a) establishes three circumstances under which an abortion shall not be considered a criminal abortion. And Ga. Code Ann. §26-1202(b) (1969) prescribes procedure which *must* be followed if an abortion is to be authorized by or performed under 1202(a).

Ga. Code Ann. §26-1202(b) (1969) provides in relevant part:

"No abortion is authorized or shall be performed under this section unless each of the following conditions is met:

* * *

[612]

(6) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the operation is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

Thus, the denial of plaintiff's application for an abortion, on the grounds alleged, was not the decision of a private physician declining to render professional services, occasioned by the mere existence of Georgia's Abortion Act. The statute confers upon the hospital committee power to grant or deny abortions. A decision denying an application for abortion on the ground that the woman's situation does not fall within one of the three enumerated exceptions is an exercise of that power, which allegedly violated plaintiff's constitutional rights. To this extent then, this statute has been invoked against the plaintiff Mary Doe, causing an alleged constitutional deprivation. Here, there has been actual interference with a claimed constitutional right by the decision of a body which the State has vested [613] with power to grant or deny legal abortions. These circumstances put plaintiff and the defendants on opposite sides of a very

real and lively controversy, amenable to judicial resolution.

Accordingly, it appears that May Doe's complaint, in this context, presents a justiciable controversy. Since the claims of the other plaintiffs do not stand in such a posture, the Attorney General's motion to dismiss must be granted to that extent.

C. *Exhaustion.*

There is no merit to the defendant Slaton's motion to dismiss for failure to exhaust state remedies. It does not appear that there are any administrative remedies for the denial by a hospital committee of an application for an abortion. And however desirable such a requirement might be for orderly judicial administration, there is no requirement that a litigant in federal court exhaust state judicial remedies, where he is asserting a claim in proceedings other than *habeas corpus* involving a subject over which the federal and state courts have concurrent jurisdiction. As will appear below, the instant case does not involve granting injunctive relief.

THE MERITS

Plaintiff asserts that certain cases leading up to and following *Griswold v. Connecticut*, 381 U. S. 479 (1965) establish a Constitutional right to privacy broad enough to encompass the right of a woman to terminate an unwanted pregnancy in its early stages, by obtaining an abortion. See *Stanley v. Georgia*, 394 U.S. [614] 557 (1969); *Loving v. Virginia*, 388 U. S. 1 (1967); *Skinner v. Oklahoma*, 316 U. S. 535 (1942); *Olmstead v. United States*, 277 U. S. 438, 478 (1928) (dissenting opinion of Mr. Justice Brandeis); *Pierce v. Society of Sisters*, 268 U. S. 510 (1925); *Meyer v. Nebraska*, 262

U. S. 390 (1923). While the Court agrees that the breadth of the right to privacy encompasses the decision to terminate an unwanted pregnancy, we are unwilling to declare that such a right reposes unbounded in any one individual. Rather, we are of the view that although the state may not unduly limit the reasons for which a woman seeks an abortion, it may legitimately require that the decision to terminate her pregnancy be one reached only upon consideration of more factors than the desires of the woman and her ability to find a willing physician.

In *Griswold v. Connecticut*, 381 U. S. 479 (1965), the Supreme Court held that the decision to use contraceptive devices is an aspect of a relationship lying within a penumbral zone of privacy created by several fundamental constitutional guarantees, and that a state law forbidding the use of such devices unduly invades that area of protected freedoms with maximum destructive effect upon that relationship. 381 U. S. at 485. In a concurring opinion, Mr. Justice Goldberg differed with the majority only to the extent of stipulating that the right to marital privacy is encompassed in his concept of personal liberty because of the Ninth Amendment, rather than because of penumbral emanations of specific constitutional guarantees.

For whichever reason, the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy.² Like the decision [615] to use contraceptive

²We see no connection between this theory and the claimed unlimited right of a woman "to use her body in any way she wishes" read into *Griswold* by some. There are obvious limitations to the latter such as self abuse, e.g. disease, drugs, suicide, etc. and the rights of others in which the state clearly has an interest. Any such theory in its ultimate is flatly rejected.

devices, the decision to terminate an unwanted pregnancy is sheltered from state regulation which seeks broadly to limit the reasons for which an abortion may be legally obtained. However, unlike the decision to use contraceptive devices, the decision to abort a pregnancy affects other interests than those of the woman alone, or even husband and wife alone.

Once conception takes place and an embryo forms, for better or for worse the woman carries a life form with the *potential* of independent human existence.³ Without positing the existence of a new being with its own identity and federal constitutional rights, we hold that once the embryo has formed, the decision to abort its development cannot be considered a purely private one affecting only husband and wife, man and woman.

A potential human life, together with the traditional interests in the health, welfare and morals of its citizenry under the police power, grant to the state a legitimate area of control short of an invasion of the personal right of initial decision.

The whole thrust of the present Georgia statute⁴ is to [616] treat the problem as a medical one. Such approach

³This view of the impact of conception on the decision not to have children implies that the distinction between a quick and unquick fetus, and even that between embryo and fetus is not relevant here.

And since the Court does not postulate the existence of a new being with federal constitutional rights at any time during gestation, the motion of Mr. Ferdinand Buckley for reconsideration of the order revoking his appointment as guardian *ad litem* for the embryo (or fetus) is denied. Mr. Buckley's motion to intervene in such capacity is also denied. However, he has the Court's appreciation for his participation in this litigation as *amicus curiae*.

⁴Apparently patterned after the American Law Institute, Model Penal Code §230.3 (Proposed Official Draft, 1962).

is reasonable and seemingly sound inasmuch as medical practitioners are in the best position by virtue of training to judge concurrently the basis as well as the risk inherent in such a decision. In this respect, the state moreover has a legitimate interest in seeing to it that the decision—personal and medical—is not one undertaken lightly and without careful consideration of all relevant factors, whether they be emotional, economic, psychological, familiar or physical. For example, the legislature might require any number of conditions such as consultation with a licensed minister or secular guidance counselor as well as the concurrence of two licensed physicians or any system of approval related to the quality and soundness of the decision in all its aspects. It certainly has a clear right to circumscribe a decision made by a woman alone or by a woman and a single physician and to guard against the establishment of transient “abortion mills” by the occasional opportunistic or unethical practitioner and the concomitant dangers to his patrons and the public. Such controls and requirements, so long as they do not restrict the reasons for the initial decisions and do not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment, are properly within the sphere of legislative discretion. In that respect, where abortions may be obtained only from licensed physicians and surgeons, and only after psychiatric consultation, the mere fact that physicians and psychiatrists are more accessible to rich people than to poor people, making abortions more available to the wealthy than to the indigent, is not in itself a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Cf. Dandridge v. Williams*, 397 U. S. 471 (1970); *MacQuarrie v. McLaughlin*, 294 [617]

F. Supp. 176 (D. Mass. 1968), *aff'd* 394 U. S. 456 (1969).

Moreover, there is an overriding interest in the manner of performance as well as the quality of the final decision to abort. Obvious need for control through licensing, sanitation requirements and proper medical standards in the execution of a legal abortion are examples. Again such decisions address themselves to legislative decision based upon informed judgment.

Having decided that the reasons for an abortion may not be proscribed, but that the quality of the decision as well as the manner of its execution are properly within the realm of state control, the present statute must be examined in such light.

Rather than regulating merely the quality of the decision to have an abortion, and the manner of its performance, the Georgia statute also limits the number of reasons for which an abortion may be sought. This the State may not do, because such action unduly restricts a decision sheltered by the Constitutional right to privacy. *See Griswold v. Connecticut*, 381 U. S. 479 (1965); *California v. Belous*, 71 Cal. 2d 991, 458 P. 2d 194 (1969), cert. den. 397 U. S. 915 (1970). The question becomes a matter of statutory overbreadth.

Based upon the above, the court finds the following portions of Georgia Code §26-1202 to be in violation of the constitutional rights of petitioner:

A. Section (a) beginning with the word "because" on line 5 and through subsection (a)(3) in its entirety.

[618]

B. Section (b) subsection (3) beginning with the

word "because" on line 6 and through the end of said subsection.

C. Section (b) subsection (6) in its entirety.

D. Section (c) in its entirety.

There being no showing to the contrary, the court further finds the remainder of said Code §26-1202 to constitute a proper exercise of state power within the context of this opinion.⁵

An appropriate formal declaratory judgment may be presented upon request of any party.

ABSTENTION

It is recognized that there is no pending state court proceeding against which the injunction prayed by plaintiff would operate. Nevertheless, the request for injunctive relief is denied, on the same basis as such a prayer would be denied were a state proceeding actually in progress:

" . . . the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted . . . that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court." *City of Greenwood v. Peacock*, 384 U. S. 808, 828 (1968).

[619] However under the authority of *Zwickler v. Koota*, 389 U. S. 241 (1967), the Court has proceeded to issue the declaratory relief, in spite of its unwillingness to

⁵It is not thereby implied that those provisions constitute the only or best means of state control. On the whole, the present system appears unnecessarily cumbersome, a potential hazard under due process and equal protection considerations.

broadly enjoin future prosecutions under the Act. Accordingly, plaintiff's request for a declaratory judgment is hereby granted. Judgment shall issue in the form described above.

IT IS SO ORDERED.

This the 31 day of July, 1970.

/s/ LEWIS R. MORGAN

LEWIS R. MORGAN
United States Circuit Judge

/s/ SIDNEY O. SMITH, JR.

SIDNEY O. SMITH, JR.
United States District Judge

/s/ ALBERT J. HENDERSON, JR.

ALBERT J. HENDERSON
United States District Judge

[620]

(Filed and entered in Clerk's Office Aug. 25, 1970,
Claude L. Goza, Clerk; By: JWE, Deputy Clerk)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al,

Plaintiff

vs.

ARTHUR K. BOLTON, as
Attorney General of the State of
Georgia; LEWIS R. SLATON, as
District Attorney of Fulton County,
Georgia; and HERBERT T.
JENKINS, as Chief of Police of the
City of Atlanta,

Defendants

CIVIL ACTION
NUMBER 13676

JUDGMENT

This action came on for hearing on defendants' motions to dismiss on June 15, 1970, before a three-Judge Court composed of Lewis R. Morgan, United States Circuit Judge, Sidney O. Smith, Jr., and Albert J. Henderson, Jr., United States District Judges.

Plaintiffs' request to introduce evidence in proof of allegations of the complaint was denied; defendants' motions to dismiss were treated as motions for summary judgment; argument was heard on the Court's jurisdiction and the constitutional issues raised. The Court issued its opinion on July 31, 1970.

Having determined that a substantial constitutional question was raised, one which created a justiciable controversy between plaintiff Mary Doe and the defendants, over which question this Court has jurisdiction and which it does not abstain from exercising; and

Having granted plaintiff Mary Doe's request for a declaratory judgment and denied her request for injunctive relief,

[621] Judgment is hereby entered as follows:

1. The following portions of the Criminal Code of Georgia, §26-1202¹, are declared to be in violation of the constitutional rights of Petitioner Mary Doe, within the context of the aforesaid opinion:

- A. Section (a) beginning with the word "because" on line 5 and through subsection (a)(3) in its entirety.
- B. Section (b) subsection (3) beginning with the word "because" on line 6 and through the end of said subsection.
- C. Section (b) subsection (6) in its entirety.
- D. Section (c) in its entirety.

2. The remainder of the said section 26-1202 of the Criminal Code of Georgia is declared to constitute a proper exercise of state power, within the context of the court's opinion.

IT IS THEREFORE ORDERED, that the complaint of all plaintiffs except Mary Doe be dismissed; that the

¹It is the intention of this Court that our decision reach the codification of identical provisions of Ga. Code Ann. § 26-9925a and corresponding provisions enumerated above if such codification has any force as law.

above sections of the Georgia Abortion Statute are declared void on their face for unconstitutional overbreadth; that plaintiffs' application for injunction be dismissed; costs of this cause are taxed against defendants.

The request for stay of this order pending any appeal is denied.

IT IS SO ORDERED.

This the 24th day of August, 1970.

FOR THE PANEL.

/s/ SIDNEY O. SMITH, JR.

SIDNEY O. SMITH, JR.
United States District Judge

[622]

(Filed in Clerk's Office Sep. 3, 1970, Claude L. Goza,
Clerk; By: MJW, Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, ET AL,

Plaintiff

VS.

ARTHUR K. BOLTON, As
Attorney General of the State of
Georgia; LEWIS R. SLATON, as
District Attorney of Fulton
County, Georgia; and
HERBERT T. JENKINS,
as Chief of Police of the
City of Atlanta,

Defendants

CIVIL ACTION
NUMBER 13676

**MOTION OF FERDINAND BUCKLEY AS NEXT
FRIEND OF UNBORN CHILD OF MARY DOE
TO ALTER OR AMEND JUDGMENT**

Comes now the unborn child of Mary Doe, acting
through his next friend, and pursuant to Rule 59 (e) of
the Federal Rules of Civil Procedure moves the Court
to alter or amend its judgment of August 24, 1970 upon
the following grounds:

1.

Said judgment contains no express ruling upon the

motion of the unborn child of Mary Doe to intervene in the above styled action.

2.

Said judgment contains no express ruling upon the motion of the guardian ad litem of the unborn child of Mary Doe for reconsideration of this Court's order revoking the appointment of a guardian ad litem for the unborn child of Mary Doe.

3.

Said judgment contains no express ruling upon the prayers contained in the answer and counterclaim which were filed in behalf of the unborn child of Mary Doe prior to revocation of the appointment of the guardian ad litem for the unborn child [623] of Mary Doe, and said answer and counterclaim were never stricken or acted upon by the Court.

WHEREFORE, the unborn child of Mary Doe, acting through his next friend, prays that this Court alter or amend its judgment of August 24, 1970 so as to expressly rule upon the issues raised in the aforesaid motions, answer and counterclaim and that said rulings be in accordance with the prayers of the aforesaid motions, answer and counterclaim.

Respectfully submitted.

/s/ FERDINAND BUCKLEY

Unborn Child of Mary Doe by
Next Friend, Ferdinand Buckley

1515 Peachtree Center South
225 Peachtree Street, N. E.
Atlanta, Georgia 30303

[624]

(Filed in Clerk's Office Sep. 15, 1970; Claude L. Goza, Clerk); By: MJW, Deputy Clerk)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, ET AL.,

Plaintiffs,

v.

ARTHUR K. BOLTON, ET AL.,

Defendants.

CIVIL ACTION

NO. 13676

PETITION OF JANE ROE TO INTERVENE
AS PLAINTIFF AND TO CLARIFY AND ENFORCE
THE COURTS' OPINION OF JULY 31, 1970

1. Comes now, Jane Roe, and petitions and moves the Court that she be permitted to intervene in this action as a party plaintiff and that Georgia Baptist Hospital, a Georgia corporation with its principal place of business in Atlanta, Georgia, and R. Mitchell Sealey, M.D., in his capacity as Chief of Obstetrical and Gynecological Services of Georgia Baptist Hospital, be intervened as defendants. Plaintiffs' action and the original have a question of law in common and intervention is authorized under Rule 24.

2. Plaintiff seeks a temporary restraining order, preliminary and permanent injunction against the enforcement of Ga. Code Ann. § 26-1201(b), (d) and (e) (hereafter called the "Georgia Abortion Act or Statute"), and enforcing this Court's Opinion in this case dated July 31, 1970.

3. Plaintiff seeks a declaratory judgment that the above sections of the Georgia Abortion Statute are unconstitutional on their face and as applied in that they deprived her and her physician of rights protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

4. This Court's jurisdiction has heretofore been invoked under the above constitutional amendments and Title 28, U.S.C. §§ 2281 and 2284; 42 U.S.C. § 1983; and 28 U.S.C. § 2201-2. This is a petition [625] to enforce and clarify the Court's prior order and to further consider the constitutionality of the above section of the Georgia Abortion Statute on its face and as applied.

5. The three judge panel heretofore convened in this case is requested to grant an oral hearing for the presentation of evidence and argument of questions raised in this petition to intervene.

6. Plaintiff files this motion to intervene as a member of the class of pregnant women heretofore represented by Mary Doe and as representative of the members of a class who have been denied use of hospital facilities by abortion committees without due process of law or in denial of equal protection of the law or other constitutional rights.

7. Plaintiff herein referred to as Jane Roe is a natural person employing a fictitious name in order to protect her true identity. It is her belief that the use of her true name would subject her to unfavorable publicity resulting in great embarrassment, ridicule and intimidation. A sealed affidavit containing intervening plaintiff's true identity will be filed with the Court upon direction.

8. Intervening plaintiff is unmarried, presently un-

employed and approximately eight to ten weeks pregnant. After consulting with and being counseled by her physician and two psychiatrists, she applied through her doctor to Georgia Baptist Hospital for a therapeutic abortion. There were no medical indications that the abortion should not be performed. The two consulting psychiatrists counseled with her physician that in their best clinical judgment an abortion was necessary. She certified that she was a resident of Georgia and her physician, she believes, completed all documents, papers and procedural requirements of the Georgia law and rules of said hospital. On or about September 11, 1970, she was advised by her physician that her application had been denied. Plaintiff was never furnished a written explanation of the reason for the denial of her request for this medical service.

[626] 9. Intervening plaintiff's attorney sought to have said decision reviewed by an appellate review board of said hospital but was advised by defendant Dr. Sealey that there was no established procedure for appealing decisions of the committee. After much urging, Dr. Sealey, on September 14, 1970, at 7:00 p.m. agreed to bring the matter of establishing an appeal procedure and Jane Roe's case before the Executive Committee of the Obstetrical and Gynecological Service of the hospital on September 15, 1970, at 7:00 a.m. provided Jane Roe or her doctor or her attorney would be present with "her file." Plaintiff was unable to comply because the psychiatric consultation letters had been returned to her and they were in the hands of another physician for presentation to another hospital abortion committee. Plaintiff was not able to obtain her file, neither was her Georgia Baptist physician or her attorney. A copy of all

of plaintiff's consultations, certificates, etc., are maintained in her file by Georgia Baptist Hospital and should have been available to the abortion committee or Dr. Sealey and the Executive Committee of his department.

10. Plaintiff was advised by Dr. Sealey that the Georgia Baptist Abortion Committee had adopted the standards of the American College of Obstetricians and Gynecologists as standards which the Committee would apply in deciding whether or not an abortion would be approved. The "ACOG" standards are as follows:

"Termination of pregnancy by therapeutic abortion is a medical procedure. It must be performed only in a hospital accredited by the Joint Commission on Accreditation of Hospitals and by a licensed physician qualified to perform such operations.

"Therapeutic abortion is permitted only with the informed consent of the patient and her husband, or herself if unmarried, or of her nearest relative if she is under the age of consent. No patient should be compelled to undergo, or a physician to perform, a therapeutic abortion if either has ethical, religious or [627] any other objections to it.

"A consultative opinion must be obtained from at least two licensed physicians other than the one who is to perform the procedure. This opinion should state that the procedure is medically indicated. The consultants may act separately or as a special committee. One consultant should be a qualified obstetrician-gynecologist and one should have special competence in the medical area in which the medical indications for the procedure reside.

"Therapeutic abortion may be performed for the following established medical indications:

- "a. When continuation of the pregnancy may threaten the life of the woman or seriously impair her health. In determining whether or not there is such risk to health, account may be taken of the patient's total environment, actual or reasonably foreseeable.
- "b. When pregnancy has resulted from rape or incest: in this case the same medical criteria should be employed in the evaluation of the patient.
- "c. When continuation of the pregnancy is likely to result in the birth of a child with grave physical deformities or mental retardation."

Plaintiff's attorney was advised that if Jane Roe's abortion was denied it was because she did not fall within any of the reasons for abortion within the "ACOG" standards used by the Georgia Baptist Abortion Committee. Plaintiff alleges that said standards are unconstitutionally vague and improperly adopted and applied by said Committee. Plaintiff alleges that such standards violate her constitutional rights and are in conflict with the decision of this Court (Opinion of July 31, 1970).

[628] 11. Because the Committee has denied plaintiff's application for a therapeutic abortion, she has been forced to seek an abortion at another hospital thereby incurring additional expenses for another physician, or seek an abortion termed illegal under Georgia law, or to borrow money in order to obtain a therapeutic abortion outside the State of Georgia involving great expense and inconvenience to her. Said alternatives and pro-

cedures are unnecessarily expensive and burdensome requiring a great expenditure of money and time and deny her equal access to medical care and facilities thereby depriving her of due process and equal protection of the laws. Further, said action negates and invades her right of privacy in deciding when and the number of children she will bear such action being in violation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

12. Plaintiff alleges that under this Court's decision of July 31, 1970, the decision of whether or not one will bear a child is a personal and medical decision to be arrived at by a woman, her physician and two consulting physicians or psychiatrists; that the Abortion Committee of a hospital may not substitute its judgment or values for that of a woman and her physicians and rule that one's reason is not sufficient; that under the Court's decision and the statute as it now remains, the duty of the abortion committee is merely an administrative rather than a judicial function; and that the Court should clarify its prior opinion.

13. The delegation of authority to decide if an abortion may be performed and for what reasons, to hospital abortion committees is an unlawful delegation of state authority thereby depriving plaintiffs and members of her class, of due process and to equal protection of the laws.

14. The statute is unconstitutional on its face and as applied in that it deprives plaintiff of equal access to both public and private medical facilities which on information and belief receive [629] substantial federal and state funding, such equal access being guaranteed

by the Fifth and Fourteenth Amendments to the Constitution. Further, said statute is unconstitutional on its face in that it permits an abortion to be performed only in a hospital accredited by the Joint Commission on Accreditation of Hospitals. Plaintiff is advised and alleges that only 82 out of 214 licensed Georgia hospitals have been accredited by said Joint Commission and the statute which limits abortions to accredited hospitals is unconstitutional because it deprives many members of Mary Doe and Jane Roe's class who live in an area served only by a licensed but not accredited hospitals of access to abortion service.

15. The Georgia Abortion Statute provides that Abortion Committees will be established and maintained in accordance with "standards" of the "Joint Commission on Hospital Accreditation" without specifying whether said commission is an existing state or national agency or otherwise fully identifying said Commission. That plaintiffs and other Georgia citizens have no rule making safeguards over a national organization known as the Joint Commission on Hospital Accreditation, of Chicago, Illinois, and the delegation of authority to such an organization to set standards for Georgia abortion committees is a denial of procedural due process. The present commission standards (which will be exhibited by Appendix to the Court) are vague and indefinite and do not delineate rights of patients or physicians with adequate definiteness resulting in many interpretations by various hospital abortion committees and lack of uniformity throughout the state.

16. That plaintiff has incurred medical expenses, hospital bills, attorney's fees, court costs, court reporter fees,

etc., as a result of the wrongful action of defendant Georgia Baptist Hospital through its Abortion Committee's unlawful infringement of plaintiff's constitutional rights.

WHEREFORE, plaintiff Jane Roe prays:

1. That she be permitted to intervene as a party plaintiff [630] and member of the class originally represented by Mary Joe and that the named defendants be intervened as such.

2. That the three-judge court previously convened pursuant to 28 U.S.C. §§ 2282 and 2284 hear and determine this proceeding.

3. That a declaratory judgment be issued holding the Georgia Abortion Statute, section 26-1202(b), (d) and (e) to be in violation of the rights of plaintiff as protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

4. Pending the hearing and determination of the prayers for permanent relief, the Court enter an interlocutory injunction restraining the original and intervened defendants from denying the use of its operating facilities to plaintiff's physician for the purpose of terminating plaintiff's pregnancy.

5. That a permanent injunction be entered restraining and enjoining the original and intervened defendants from enforcing or in any way effectuating the provisions of Ga. Code Ann. § 26-1202(b), (d) and (e), or otherwise applying said sections in derogation of plaintiff's rights or the rights of members of her class.

6. That plaintiff be awarded damages in an amount deemed appropriate by this Court together with an

amount of punitive damages and tax the costs of this cause against the intervened defendants.

7. For such other relief as may be deemed proper by this Court.

Respectfully submitted,

/s/ MARGIE PITTS HAMES

MARGIE PITTS HAMES
210 Brighton Road, N. E.
Atlanta, Georgia 30309

Attorney for Plaintiff

[647]

(Filed in Clerk's Office Sep. 25, 1970, Claude L. Goza,
Clerk; By: HDS, Deputy Clerk)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al.,

Plaintiffs,

v.

ARTHUR K. BOLTON, et al.,

Defendants.

CIVIL ACTION

NO. 13676

MEMORANDUM IN OPPOSITION OF MOTION
TO INTERVENE

Arthur K. Bolton, Attorney General of the State of Georgia, a Defendant in the above-styled cause, opposes the Petition of Jane Roe to intervene filed September 15, 1970, on the following grounds:

(1) The alleged complaint, particularly insofar as it involves the original defendants, is entirely moot. The basis for Petitioner's attempt to intervene was that she allegedly had been denied approval for an abortion by a hospital not party to this cause. This Defendant has been advised by Petitioner's attorney that Jane Roe has subsequently been granted approval for abortion by the hospital attempted to be intervened as an additional party defendant. Consequently, she has no standing as a plaintiff in the instant suit to challenge the Georgia Criminal Abortion Law. The only prayer which might remain is Petitioner's claim for monetary damages, which

in no way involves, or is sought to involve, any of the original defendants.

[648] (2) The attempted intervention fails to show a claim of Petitioner which contains a question of law or fact in common with the main action, particularly in light of the described mootness.

Even assuming there is no question of mootness, Petitioner's attempt to intervene is for the purpose of compelling a private hospital, not an original party, to permit the use of its facilities for an abortion to be performed on her. This raises no question of law or fact common to the original action, except as to the constitutional challenge to certain sections of the Law. This, of course, merely attempts to raise again an issue raised, argued, considered, and rejected by the Court in the main cause. Recourse is by appeal, which has already been commenced. No purpose will be served by adding another unknown plaintiff, represented by the same counsel as the original plaintiff, to pursue the same position. There is no allegation or showing that Jane Roe's interests in seeking appellate review of this Court's decision with respect to subsections (b) (d) and (e) of the Law, will not be adequately represented by existing parties. Thus, the "common" question has already been finally litigated in this Court.

With that exception thus disposed of, an analysis of Petitioner's complaint shows that it is against a non-defendant hospital, and, in her view, its chief of obstetrical and gynecological services. Entirely new issues of fact are raised, since her pre-mootness circumstances and Mary Doe's bear nothing in common other than that they both seek an abortion. Entirely [649] new issues

of law are raised since the allegations challenged the legality of a private hospital's internal administrative policy based on medically proposed standards, not on the State's criminal statute which was challenged in the principal cause.

Whether or not mootness is considered, other issues, not even collateral to the principal cause but rather totally unrelated to it, are raised by Petitioner's claim for money damages. Both issues of fact and law are obviously injected by this claim, which has no bearing on the original parties and is of no consequence or substantial interest to them. The relationship between non-plaintiff Roe and non-defendants Sealey and Georgia Baptist Hospital contains no nexus with the principal parties. Damages she may have suffered by the Hospital's and Doctor Sealey's actions bear no common interest to the main cause. If collection is her goal, a separate suit should be instituted. It is submitted that she has an adequate remedy at loss for any damages, and the complex questions involved therein are not germane to the instant cause.

(3) The attempted intervention will unduly delay and prejudice the final adjudication of the rights of Defendant and the State of Georgia.

Petitioner has not alleged that she has an absolute right to intervene, and in fact, she does not have such a right. Rule 24(a), Federal Rules of Civil Procedure. Rather, she seeks to intervene pursuant to the permissive provision of Rule 24(b). Defendant recognizes that such interventions are purely discretionary on the part of the Court, and that the Court's principal [650] consideration is whether or not a permissive intervention will

unduly delay or prejudice the adjudication of the rights of the principal parties. An intervention at this late point would unduly delay and prejudice the ultimate conclusion of the cause, which has already been finalized by this Court. Appeal to the United States Supreme Court has been commenced by all parties to the principal action. The necessity for further proceedings, pleadings by new parties, hearings, and determinations should intervention be permitted would inevitably delay the final outcome of the cause. As notably recognized in *Crosby Steam Gauge and Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F.Supp. 972 (D. Mass. 1943):

“Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions, and the like which tend to make the proceeding a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief *amicus curiae* and not by intervention.”

The interests of this Defendant and the State of Georgia in obtaining an ultimate judicial determination of the validity of a State criminal statute of state-wide application at the earliest possible time, are obvious and legitimate. No possible purpose could be served in further delaying that goal. Particularly when it may be construed that the Court has suggested, as here, [651] that further legislative action be taken with respect to the statute in question, it is imperative that that opportunity not be jeopardized by an intervention, such as Jane Roe's, that is not absolutely compelled. It is submitted that the purpose of Rule 24 is to avoid undue

delay and expense to all parties. The attempted intervention in this case would not only fail to serve this purpose, but, to the contrary, would aggravate and increase delay and expense to parties totally unaffected by Jane Roe's non-mooted claims.

The Court, in considering permissive intervention, may also consider other factors besides the possible delay cause. The court in *Durkin v. Pet Milk Co.*, 14 F.R.D. 374 (1953), quoting the United States Supreme Court in *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, at 141, noted:

"It is common knowledge that, where a suit is of large public interest, the members of the public often desire to present their views to the court in support of the claim or defense. To permit a multitude of such interventions may result in accumulating proofs and arguments without assisting the court.'" *Durkin v. Pet Milk Co.*, *supra*, p. 380.

The court in *Durkin* felt that the attempt to intervene was merely a reassertion of precisely the same claims made in the principal suit, and that when considered with the slight delay that the intervention might occasion, the motion to intervene [652] should be denied. Since in this case, the Court's final decision has already been rendered, the attempt to relitigate the issues which plaintiffs may be dissatisfied with, should be denied.

(4) The attempted intervention is not timely, having been filed about six weeks after the Court's opinion had been rendered on the merits of the principal action, and almost a month after the final judgment had been entered. Intervention after judgment is unusual and not often granted. *Turner v. Willard*, 157 F.Supp. 451

(S.D.N.Y. 1957). It has been held that intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected. *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir. 1944), *cert. den.* 323 U.S. 777. Petitioner here shows no such necessity.

At this state of the proceedings, and in consideration of her present status as known, Jane Roe has merely a general interest in the subject matter of the litigation. This is insufficient. *Jewel Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America* (W.D. Va. 1943), 3 F.R.D. 251. She must have an enforceable right. *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 76 F.Supp. 335 (S.D.N.Y. 1948). She has no enforceable right, that under the circumstances, would involve the principal defendants. As to her petition for a declaratory judgment, her rights have already been declared, in the Court's opinion and judgment entered in this cause; and by virtue of the hospital's subsequent approval, her rights have been granted and afforded. Her petition to intervene must present a judicable controversy. *Rose v. Brotherhood of R.R.&S.S. Clerks*, 181 F.2d 944 (4th Cir. 1950), *cert. den.* 340 U.S. 851; *Wilson v. Illinois Cent. R. R.*, 21 F.R.D. 588 (N.D. Ill. 1957), 21 F.R.D. 588.

[653]

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition of Jane Roe be denied and dismissed.

/s/ **ARTHUR K. BOLTON**

ARTHUR K. BOLTON
Attorney General

/s/ **HAROLD N. HILL, JR.**

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/s/ **MARION O. GORDON**

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[662]

(Filed in Clerk's Office Oct. 6, 1970, Claude L. Goza,
Clerk; By: JWE, Deputy Clerk)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

MARY DOE, ET AL,

VS.

ARTHUR K. BOLTON, ET AL,

} CIVIL ACTION

} NO. 13676

**MEMORANDUM IN SUPPORT OF THE PETITION
OF JANE ROE TO INTERVENE AS PLAINTIFF
AND TO CLARIFY AND ENFORCE THE
COURT'S OPINION OF JULY 31, 1970**

Jane Roe, by and through her attorneys, files this Memorandum in support of her Petition to Intervene and Motion to Clarify and Enforce the Court's Opinion of July 31, 1970, and shows to the Court the following:

I

SUMMARY OF CASE

On September 11, 1970, Jane Roe's application to the Georgia Baptist Hospital Abortion Committee for an abortion was denied. She was advised of this denial by her physician who presented her request to the committee. The abortion was considered "necessary" in his best clinical judgment and that of two psychiatrists consulting with him on this matter. The abortion committee ruled that the abortion was not necessary in accordance with their best medical or clinical judgment and

in arriving at that judgment apparently applied the American College of Obstetricians and Gynecologists standards which specifies that abortions may be performed for only three reasons (basically those which this Court declared unconstitutional on July 31, 1970). On the date September 15, 1970, this action was filed seeking a temporary restraining order and declaratory relief that the standards applied by Georgia Baptist Hospital were unconstitutional and further that the portion of the statute requiring approval by abortion committees (and other requirements) was unconstitutional. [663] The decision of the abortion committee was reversed; notice of said reversal was dated September 16, 1970, but not received by plaintiff's attorney until September 23, 1970.¹ Plaintiff's attorney was advised by Jane Roe that her request for an abortion was also turned down by Crawford Long Hospital but she was approved at Piedmont Hospital. Said abortion was scheduled several days ago, however, plaintiff's attorney has been unable to reach Jane Roe to confirm that the abortion has in fact been performed.

¹The Objections of said Hospital and Dr. Sealy filed by their attorney Mr. Pearce do not accurately reflect what happened at the time of filing. Most of the events are now irrelevant, however, it is implied that counsel acted unreasonably or improperly. Notice of plaintiff's intent to file this proceeding was given Dr. Sealey September 14th and Mr. Pearce on the 15th prior to 10:00 a.m., said petition and request for TRO to be presented to Judge Smith at noon on the 15th. Mrs. Hames did receive a call from Mr. Pearce that the decision had been reversed and advised he would be available to come talk with Judge Smith about same. After Judge Smith set an in-chambers conference at 1:45 p.m., Mr. Pearce was called; he had "left the office for the day." Unsigned papers were mailed Mr. Pearce on an informal basis since copies of all papers had been furnished the clerk for service by the Marshall. The members of the Abortion Committee were not named as parties because Georgia Baptist has a rotating com-

The status of this matter, in all probability, is that Jane Roe has received an abortion; however, that does not moot other requests and allegations of the petition to clarify the Opinion of the Court. Plaintiff seeks a declaratory judgment that Ga. Code Ann. Sec. 26-1201 (b), (d) and (e) are unconstitutional. She alleges that she is a member of the class of pregnant women heretofore represented by Mary Doe and she is representative of a class of persons who have been denied use of hospital facilities by abortion committees without due process of law and in denial of equal protection of the laws. She further requests that the Court clarify its opinion of July 31, 1970, as to the role of abortion committees under the statute if the Court refuses to declare the remaining sections of said law unconstitutional.

The Attorney General asserts that this is an attempt to relitigate issues argued, raised, considered and rejected by the Court in the main cause. Plaintiff's attorney would merely state that in the original case an effort was made to have the court consider evidence on the matters of [664] due process and equal protection problems in the statute; however, the Court saw fit to refuse to hear any evidence on these arguments. For that reason, plaintiff Mary Doe did not have her "full day in Court" and intervenor Jane Roe, having suffered at the hands of the remaining portion of the statute, now seeks her day in Court to litigate the unlitigated issues and to seek enforcement and clarification of the Court's Opinion. First, the two procedural questions raised will be discussed, namely, intervention and clarification of the opinion.

mittee and Mr. Pearce has refused to advise the names of physicians who sat on the committee.

II

**A PETITION TO INTERVENE UNDER RULE 24
OF THE FEDERAL RULES OF CIVIL PROCEDURE
IS PROPER FOR INTERVENTION AFTER
JUDGMENT.**

Intervention is authorized as a matter of right by Rule 24(a)(2), F.R.C.P, or as a matter of permission by Rule 24(b)(2). Intervention of right, Rule 24(a) provides:

Upon timely application any one shall be permitted to intervene in an action: . . . or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action;

The rule permitting intervention as a matter of right is to be liberally construed. See *United States v. C. M. Lane Life-Boat Co., Inc.*, 25 F. Supp. 411 (1938) and *Twentieth Century Fox Film Corp. v. Jenkins*, 7 F.R.D. 197 (1947). The present applicant for intervention, Jane Roe, is bound by the Judgment in this Court dated July 31, 1970, which held:

There being no showing to the contrary, the court further finds the remainder of said Code Sec. 26-1202 to constitute a proper exercise of state power within the context of this opinion.⁵

Foot note "5" reads as follows:

⁵It is not thereby implied that those provisions constitute the only or best means of state control. On the whole, the present system appears unnecessarily cumbersome, a potential hazard under due process and equal protection considerations.

The "remainder" of said Code are those which have op-

erated to deprive Jane Roe of the benefits of the court's opinion, that portions of the Georgia Abortion Statute were unconstitutional. That is, the requirements [665] of Sections (b), (d) and (e) deny her due process, equal protection of the laws and infringe upon her right of privacy. Unless Intervenor, as a member of the class represented by Mary Doe, is permitted to intervene, her interests may not be represented by existing parties or said representation will not be adequate. Since the filing of the petition by Mary Doe, the "law" in Georgia relating to abortions has substantially changed. Before the Court's decision of July 31, 1970, a physician and two consultants applied to an abortion committee for approval of an abortion; before the abortion could be approved, the committee had to perform an administrative-judicial function and decide if the statutory criteria had been met, that is one of three permitted reasons was present. The Court's opinion sets forth that the designation of reasons is unconstitutional but left the requirements for residency, approval of three physicians, performance in a licensed-accredited hospital, and approval by an abortion committee of said hospital. The statute as it remains provides that the criminal abortion proscription does not apply

to an abortion performed by a physician duly licensed to practice medicine and surgery pursuant to Chapter 84-9 or 84-12 of the Code of Georgia of 1933, as amended, based upon his best clinical judgment that an abortion is necessary. (b) No abortion is authorized or shall be performed under this section unless each of the following conditions is met: . . . (5) The performance of the abortion has been approved in advance by a committee of the medical staff of the hospital in which the opera-

tion is to be performed. This committee must be one established and maintained in accordance with the standards promulgated by the Joint Commission on the Accreditation of Hospitals, and its approval must be by a majority vote of a membership of not less than three members of the hospital's staff; the physician proposing to perform the operation may not be counted as a member of the committee for this purpose.

[666] Jane Doe asserts that Mary Doe does not adequately represent the interests of pregnant women members of their class in view of the change in the law and in view of the change in the role of the abortion committees provided for under the statute. The role of the abortion committee is unclear and the procedural requirements of the remainder of the statute place an undue hardship on pregnant women seeking an abortion and subject them to the confused role of the committees which was not present in the main action. The role of the committee is discussed later, however, the foregoing is set forth to demonstrate that the interests of pregnant women of Georgia today may not be fully and adequately represented in the main action in view of the present state of the law and certainly they are affected substantially by said Judgment and may be bound thereby. For these reasons, Jane Doe should be permitted to intervene as a matter of right. If intervention is not deemed a matter of right, then Jane Roe should be permitted to intervene under Rule 24(b)(2) because her claim and the main action have questions of law or fact in common. This intervention is discretionary and may be permitted if it will not unduly delay or prejudice the rights of the original parties. Jane Roe is in no way attempting to delay the appeal in this case. This portion of the

proceeding may be considered ancillary or severed from the main cause and may be consolidated with the main action during appeal. Intervention after judgment has often been held timely when used to enforce rights conferred in the original action's judgment. Jane Roe originally sought to enforce rights under the Court's Opinion of July 31, 1970, and now seeks a declaration that procedures of the abortion committee denied her due process, equal protection, etc., and that the remainder of said statute infringe her constitutional rights.

In deciding timeliness, the Court should consider not only the period of time that has elapsed and the fact that Judgment has been entered, but should take into consideration the circumstances leading to the necessity for intervention, including the fact that Jane Roe had been denied the benefits of the Judgment of this Court. In *Pellegrino v. [667] Nesbit*, 203 F.2d 463 (9th Cir. 1953), intervention after judgment was allowed because the court found that it had become necessary only after judgment. Only then did it become clear that the original parties action would not protect intervenor's rights adequately by filing notice of an appeal.

Similarly, in *Wilson v. City of Paducah*, 100 F.Supp. 116, 118 (W.D. Ky. 1951), judgment was entered in favor of two Negro plaintiffs seeking entrance into college. Later two other Negroes who were subsequently denied entrance were permitted to intervene as members of the original class. The Court held that "intervention after entry of judgment was permissible to members of the class in whose behalf the action was originally filed, even though such intervenors were not specifically named as parties in the original action." Citing *System*

Federation No. 91, Rwy. Employees v. Reed, 180 F.2d 991 (6th Cir. 1950). More recently, this Court has twice permitted intervention after judgment by non-named members of the original class of plaintiffs. In *Hunter v. Allen*, Civil Action No. 11328 (N.D. Ga.), intervenor George Dean, by order dated February 19, 1969, was allowed to intervene after judgment and to receive damages for civil contempt against the original defendants. Dean complained that the original defendants, the mayor and the police chief of the City of Atlanta, had continued to enforce provisions of the City Code against him after such had been held unconstitutional in the original action. See also *Wilson v. Kelley*, Civil Action No. 11647 (N.D. Ga.) conferring upon intervenors the benefits of an earlier prison desegregation decree and granting them civil contempt damages against two non-named members of the class of defendants (June, 1970).

Intervenor Jane Roe asserts that the petition for intervention and clarification is a proper procedural vehicle to obtain the benefits of the Court's prior opinion and to seek clarification thereof.

As to the timeliness of the application to clarify the Court's opinion, it should be noted that at the time of filing the request to [668] clarify the 30 day time for appeal provided by the Federal Rules had not expired. (Final Judgment entered August 24, 1970, petition filed September 15, 1970). Hence the judgment had not yet acquired the degree of immutability normally associated with a final judgment. It appears from the following that there is considerable latitude within said period to proceed with respect to the judgment:

The Fifth Circuit has announced what may be a somewhat broader doctrine that, at least in non-jury cases, the judge on his own motion may grant rehearing at any time prior to expiration of the time for appeal. (Citing *McDowell v. Celebrezze*, 310 F. 2d 358 (2d Cir. 1955); *Gila River Ranch, Inc. v. United States*, 368 F. 2d 354 (9th Cir. 1966) *Schildhaus v. Moe*, 335 F. 2d 529, 531 (2d Cir. 1964)). If the judge can do this on his own motion, he surely can do it on the motion of counsel. 3A *W. Barron & A. Holtzoff, Federal Practice and Procedure*, Sec. 1553 at 28 (Supp. 1968).

In this respect, it should also be noted that the Court has inherent power to effectuate its judgments. If confusion has resulted from a judgment, and intervenor asserts that it has, then a motion to enforce or clarify judgment is a proper procedure and is aimed at securing a just, speedy and inexpensive determination of the problems. Federal Rules of Civil Procedure, Rule 1. It is presumed that the defendants herein are urging that Jane Roe must file a separate action to obtain benefit of the judgment in this case. This was an argument asserted in the United States Court of Appeals for the District of Columbia Circuit in *Mary Doe, et al, v. General Hospital*, ____ F.2d ____ (May 15, 1970, No. 24,011). There hospital officials failed to abide by a lower court's decision in abortion cases:

Our primary concern is not the good faith of the city and hospital officials, but the deprivation of medical care suffered by indigent patients. This class action asserts the rights of people who have been overwhelmed by poverty, wretched medical care, unemployment, inadequate education, substandard housing, and a [669] cluster of poverty-related problems. If every poor person must bring a law-

suit each time her rights are infringed either by insensitivity or by the ignorance of city and hospital officials, all will be effectively deprived of those rights. There are limits to the ability of the most able volunteer counsel to maintain the state of alert watchfulness — and the caseload — that would be necessary to protect against wrongs on such a scale.

It is not the intention of Jane Roe or her attorneys to burden this Court's already crowded calendar, however, it is earnestly urged (by Mary Doe and Jane Roe's volunteer counsel), that the Court clarify its opinion as to the procedural aspects of the statute as it remains. A separate action involving Polly Poe vs. The Fulton-DeKalb Hospital Authority d/b/a Grady Memorial Hospital is being filed in this Court. That action seeks relief for Polly Poe and additionally seeks to adjudicate the role of the abortion committee and the constitutionality of the procedural requirements left in the statute. If this Court is inclined to dismiss this action, it is requested that the petition to intervene be severed and treated as a separate suit.

III

**THE ABORTION STATUTE AS IT REMAINS
PROVIDES NO PROCEDURAL DUE PROCESS
FOR WOMEN SEEKING ABORTIONS;
THE ROLE OF THE ABORTION COMMITTEE IS
VAGUE AND AMBIGUIOUS AND IS AN
UNLAWFUL DELEGATION OF STATE
AUTHORITY.**

As set forth above, the Court left the procedural requirements of the Georgia Abortion Statute in the law. In order to obtain an abortion, one must be a resident of

Georgia, one must convince her physician that an abortion is necessary, they must convince an abortion committee of a hospital that it is necessary and the abortion may be performed only in an accredited-licensed hospital. This, the court observed, appears "unnecessarily cumbersome, a potential hazard under due process and equal protection considerations." This is exactly the problem and is operating to deny many women abortions and denying many physicians the right to render medical services to their patients that they deem necessary in their best clinical judgment.

The procedure requires that a woman be able to juggle physicians and hospitals into a winning combination—the odds are probably no better [670] than those for a line of lemons on a Las Vegas slot machine. Assume, however, that Jane Roe sees a physician and in his best clinical judgment he deems an abortion necessary and after two consulting opinions which concur, her case is presented to the abortion committee. What are the problems then? Here, Jane Roe's case demonstrates what can actually happen. A physician submits a written request to the abortion committee—there is no time for presentation of cases on an oral basis because of the time it would require not only from the proposer's stand point but from the stand point of the committee members. The committee then must approve. Query, what type of approval is necessary. Under the statute as originally written by the legislature, the abortion committee had to decide whether one of the three reasons for abortions was present. Now there are no reasons—what is the role of the committee. The committees are acting in many different ways over the state. For example, Georgia Baptist Hospital abortion committees

had been using the ACOG standards according to Dr. Sealey. It should also be noted that the General Counsel for the Medical Association of Georgia and the Georgia Hospital Association issued an opinion (which was circulated over the State) which defined the role of the committee to be the same as the woman's physicians and consultants, i.e., the committee must find that an abortion is necessary in their best clinical judgment. **THUS**—Jane Roe and the other women of Georgia must convince an administrative arm of the State without an opportunity to appear before the committee, or an opportunity to be heard. Her fate is guided by the written requests and opinions of her physicians. Can it be really said that the members of the committee, without seeing the patient or examining her or discussing the matter with her, is in a position to substitute their judgment for that of the three physicians who have seen her. There is no appeal from the decision of the committee; the woman and her physician have no recourse. It might be said that she could go into court and seek to enforce her right, but this is no practical answer to the problems of the Mary Doe's of Georgia. Those people who are turned down generally do not have the resources to seek legal assistance to pursue their rights. It has been advanced that one may go to another hospital—that is precisely what Jane Roe did—she went to three. It is frequently stated that one may go out of state—explain that to an indigent woman who has no money to go from Grady to Georgia Baptist much less Atlanta to New York!

[671]

It is submitted that the abortion committee is not needed in the statutory structure. There is no other

medical procedure which requires the concurrence of at least five physicians. If all the practice of medicine had to be submitted to this procedure our residents would die before treatment was available—just as today, the time in which one may obtain the needed medical service (an abortion), passes before the approval can be obtained. If the abortion committee has any role to play, it should be a purely administrative role. They should not be permitted to substitute their judgment for the judgment of the woman's physician. They should check to see that all paper work has been completed, that there are no contra-medical indications, that hospital facilities may be allocated within the time in which they are needed, that a physician proposing an abortion is qualified to render the service and other matters of an administrative nature. They should not have a veto power over the physician's judgment. If the abortion committee is left in the law, its role should be limited to an administrative function. If its role is not limited, then there should be an appeal procedure whereby a woman and her physician may obtain review. Absent such a procedure, there is certainly an absence of fair play and due process.

It should be noted here that the committee procedures and practices vary from hospital to hospital. At Georgia Baptist the committee is a rotating one among staff members of the OB-GYN department. Thus, if the committee is made up of persons who have moral or ethical objections to abortions, the woman is subject to this subjective criteria without a remedy. Such is the case with the physician. Who is to insure that the committee does not act arbitrarily? This Court, nor these attorneys, certainly may not be the watch dog of the committees. If

the role of the committee is an administrative one, women will not be subjected to the caprice of anti-abortion members and their right of privacy will not thereby be invaded.

[672]

Again, the alternatives of poor women who are members of Mary Doe's class. If she is turned down by Grady Memorial Hospital, she has but two alternatives. First, she may carry the baby to term and suffer the burdens of pregnancy and an unwanted child or place the child for adoption. These alternatives place extreme psychological and social burdens on the individuals involved, mothers and children, and are a major source of psychiatric problems of our population today. The other alternative is to seek out an illegal abortionist. This forces the woman to take her life to the hands of a non-medical person for possible slaughter. This is what is still happening in our state and in our City. Women are turning to illegal abortions; they are getting infections and must be treated then to save their lives. Would it not be a better allocation of hospital dollars and facilities to perform the abortion rather than treat the botched up job? A woman determined to get an abortion will certainly resort to illegal means if she has no money and is denied a safe, medical one.

Abortion committees frequently refuse to give reasons why an abortion is turned down. If there are contrary medical indications, a woman should certainly be told. If the facilities are not available, she should be told. The reason women are being turned down is they are healthy women who do not fall within any of the three reasons previously authorized under the statute. This

certainly smacks of a denial of equal protection of the laws—if one is healthy, she cannot obtain an abortion. If one is unhealthy, her chances are better. If an opportunity to prove this assertion were given, Plaintiffs assert that the evidence would show that abortions are being performed only where the prior standards are met. Once an institution seeks to perform abortions, that service must be granted equally. See *United States v. Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969); and *Mary Doe v. General Hospital*, *supra*.

If given an opportunity to present evidence, it would show that women over the state are being denied equal protection because the statute permits abortions only in accredited hospitals. There are only 82 of 214 Georgia licensed hospitals accredited in Georgia, thereby depriving the poor resident of a rural county access to such service particularly [673] in the situation where the county hospital, even though licensed by the state, is not accredited by the Joint Commission on Hospital Accreditation. Thus, if indigent hospital care is available only at a non accredited hospital, the statute serves to deny those women residents of that county of abortion services. Travel, even assuming alternate facilities would be available in some other city, to another city can effectively make such a service unavailable. The requirement that an abortion be performed in an accredited hospital denies many women needed medical services and deprives physicians of the right to practice their profession.

The accreditation process is currently carried out by the Joint Commission on Hospital Accreditation, Inc., a private group situated at 645 North Michigan Avenue, Chicago, Illinois 60611. The Commission is self-ap-

pointed and subject to no government check and balances or governmental regulation. The Commission promulgates Standards for hospitals to meet to attain accreditation. There have been six differing versions and a 111 page massive revision is now pending. Apparently the Georgia abortion law refers to whatever version is currently in force even though this is not clear. These Standards are changed from time to time and such standards are subject to no rule making procedures which would safe guard residents of Georgia subject to its requirements. Not only is it an unlawful delegation of State authority to abortion committees to decide when abortions will be granted, it is an unlawful delegation of authority to the Commission to give them power to set standards for abortions in Georgia. This gives the Commission power to legislate reasons for abortions in Georgia. Secondly, numerous provisions in the current Standards are arbitrary and have no relationship to health needs of a patient seeking an abortion. For example, a hospital must be in operation for twelve months before it can be accepted for accreditation. This excludes many new facilities, for example Northside Hospital in Atlanta, Georgia. A hospital must have radiology facilities and emergency care for mass casualties. These are unreasonable requirements especially in view of the fact that licensed hospitals perform other surgery and are not required to be accredited for those procedures.

[674]

Thus, it appears that the court's refusal to hear evidence on the due process and equal protection objections to the statute has left many difficult practical and legal questions. If this court is not inclined to grant a hearing on the remaining constitutional problems under

the statute, it is Intervenor's request that this petition be consolidated with the Polly Poe vs. The Fulton-DeKalb County Hospital Authority (Grady Memorial Hospital), Civil Action No. _____, for determination of the issues presented herein.

Respectfully submitted,

/s/ MARGIE PITTS HAMES

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[677]

JUNE 15, 1970

oOo

JUDGE MORGAN: Gentlemen, I call the case of Mary Doe, et al, versus Arthur K. Bolton, et al. Who represents Mary Doe?

MRS. HAMES: Your Honor, I am Margie Hames. I am one of a team of attorneys. This is Tobiane Schwartz on my right and Mrs. Elizabeth Rindskopf on my left, and we represent all the plaintiffs.

JUDGE MORGAN: All right. Who represents the defendants?

* * * * *

[678]

MRS. HAMES: We have asserted several different rights on behalf of different groups of plaintiffs. The first right on behalf of Mary Doe being the First and Ninth Amendment right of privacy and right to control her own body, that is to determine for herself whether or not she will have an abortion, seek an abortion. The right on behalf of the doctors is their right to practice medicine in accordance with their [679] best medical judgment. It is their claim that they are being deprived of this right without due process by virtue of the Georgia abortion statute since it is vague and indefinite and imposes a cumbersome procedural requirement on the process of getting abortions for their patients; and further, that there is an unlawful delegation of authority to the abortion committees, state authorities, to the abortion committees since they are the arm that interprets the law. Ministers, social workers and nurses claim that their

rights, First Amendment rights of association and free speech have been infringed.

* * * * *

[685]

JUDGE SMITH: Mr. Buckley, how important is it that you have the legal status of guardian ad litem? To me that question is really wound up with the final question, and that is the balancing of rights between the mother and the unborn child. If the law is that the unborn child has rights, then undoubtedly that unborn child should be represented. If the law is that the unborn child does not have rights, then there is no need for representation. So, I think the ultimate answer to the legal question of whether there should be officially a guardian ad litem is all tied up in the problems on the merits.

MR. BUCKLEY: I agree with the Court in this sense, as Your Honor suggests, if the Court decided there [686] isn't any legal entity, obviously you wouldn't need a guardian ad litem. On the other hand, the need of someone to advocate and certainly uphold procedure for litigation is an adversary type of proceeding, but the need is for someone to try to help the Court to be certain that it has considered all issues that have any conceivable bearing on the matter.

* * * * *

[688]

JUDGE SMITH: Let me stop there. All this business about witnesses and discovery, as I read the attack of the plaintiff, it is on the statute as written. It is a facial attack on the statute and an all-out broad attack on the facial, alleged facial unconstitutionality of the

statute. I don't see what we need any evidence for to reach that question.

MR. BUCKLEY: It is a facial attack in part, but is also, as I understand the pleadings and the evidence, it is also an attack based on particular facts. Now, one of the facts that would seem to me to be of vital importance in this case is the stage of pregnancy, if the alleged plaintiff is, in fact, pregnant. Every case that is cited in the plaintiff's briefs, certainly the three principal ones, *Babbitz*, *Vuitch* and *Belous*, all involved early pregnancy cases. I can't tell from a reading of the Municipal Court calendar for Georgia cases—maybe I have forgotten, but I don't remember whether those were early pregnancy or not.

JUDGE SMITH: Well, the Georgia law makes no distinction. I think all of these would be covered in the facial attack, and if this is some effort to mute it or something like that, I don't see any point in [689] that.

MR. BUCKLEY: It goes to your jurisdictional point, too, and in other words, this court, as I understand the law, and it is true, you have already asked we submit briefs on this, and I don't want to burden you, but it looks to me like the facts would be relevant to determine whether you have controversy.

JUDGE MORGAN: I was under the impression there wouldn't be any evidence.

JUDGE SMITH: Let's assume there was no controversy. Couldn't there be a controversy shown?

MR. BUCKLEY: Certainly, as Your Honor says, assuming that this Mary Doe or whoever she may be does not have a controversy, then someone else could

come along tomorrow. Of course, I would rather the issue be decided now.

JUDGE SMITH: This is my feeling. All these little technicalities about whether the Attorney General enforces a law or not. We just spend a lot of wasted effort on that. Why don't we go on and grope with it either jurisdictionally or on the merits?

* * * * *

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JUDGE SMITH: That was my feeling. I see no need for any evidence. I think we have two basic features. One, is there Federal jurisdiction; and if there is Federal jurisdiction, what are the merits. What is the answer on the merits, the question of constitutionality of this statute. I don't see why we ought to spend a lot of time going down these trials that will carry us away from those two central issues, and I think this Court ought to meet those two issues. If we don't have jurisdiction, that ends it. If we have,

* * * * *

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JUDGE SMITH: Aren't they all doctors?

MRS. HAMES: Yes, they are.

JUDGE SMITH: As I conceive it, part of this statute is to make a medical decision the test. Now, usually the doctors complain because the Courts are interfering with their right to make a medical decision. Apparently they are saying the opposite.

MRS. HAMES: They are saying that their right to make a medical decision as to advisable medical pro-

cedure—in order to do that they must get the consent of two other physicians and then, they must convince a panel of three other physicians who interpret the law.

JUDGE SMITH: There is not a lot of difference in that and the hospital regulations, and they have recommended this hospital regulation as requiring a witness to the operation or approval of it by a committee before certain medical procedure is carried out is lawful and constitutional. This has been true since 1920 in a Texas case.

JUDGE MORGAN: What would you propose to prove by evidence, Mrs. Hames?

MRS. HAMES: We would propose to prove by Dr. Donald Block that in his practice of obstetrics that he has patients who come to him seeking an abortion and [694] that he sends them to psychiatrists and other physicians for consultations and that upon the recommendation of these physicians that is presented to the committee at Georgia Baptist Hospital, I believe is where he is staffed there, and that there is no way to predict what they will do. In some instances they are approved and in some instances they are not approved, and the law is applied in some way unknown to him so that all people who are recommended by three physicians for abortion cannot get it; they must then convince the abortion committee that this is a burdensome procedure, it takes up to five or six weeks and by that time a safe period in which an abortion can be performed is passed, that this is not only replacing his medical judgment with the medical judgments of three other people who never see the patient, by the way.

JUDGE MORGAN: That is set by the statute.

JUDGE SMITH: What does he propose as an alternative?

MRS. HAMES: He proposes that the abortion committee not have control of them.

JUDGE SMITH: Does he propose that he himself alone be able to make that decision?

MRS. HAMES: I would have to ask Dr. Block his [695] personal opinion. We say we propose as a legal matter that the abortion committee is unconstitutional in that it deprives the physicians of their right to practice.

JUDGE SMITH: Is there any question about the statute providing for the committee?

JUDGE MORGAN: Isn't it just facially on the statute as it provides for these 3 physicians? Would evidence help?

MR. BUCKLEY: You might get in some of the argument about how burdensome it is, and how facially burdensome it is might provide some question. They have a psychiatrist who is in the department and the procedures require that he be the one to examine these people, so I think it is suggested in some of the briefs that they have to go looking around for weeks to get an appointment.

JUDGE MORGAN: I mean the statute itself is what we are talking about. I can't see why we can't approach the constitutional question without evidence.

MRS. HAMES: Well, if our allegations are taken as true that it does infringe on the physician's right to practice medicine in accordance —.

JUDGE SMITH: You wouldn't want them to stipu-

late themselves out of court. If it is taken as true, it infringes on their constitutional right to practice medicine and the case would be over.

MR. BUCKLEY: Your Honor, if I can't stipulate as [696] Amicus —

JUDGE SMITH: I think you meant to say can your allegations about what is necessary to go through be stipulated as true. Is there any objection to that?

MR. BUCKLEY: Not as stated up to now. It might be that after some evaluation, it might be possible to stipulate.

MR. HIGHT: Your Honor, I think we would have an objection because as stated in the statute itself the doctors can be from a hospital abortion committee instead of, say, five or six doctors, you may have a maximum of four.

JUDGE MORGAN: What does the statute provide for, three doesn't it?

MR. HIGHT: Yes, sir, but it also provides that they can be part of the abortion committee, that you have to have a certain number in the case, some of them are on the abortion committee.

JUDGE MORGAN: What evidence do you plan to present and how many witnesses? What evidence do you plan to present?

MRS. HAMES: I had planned to present Dr. Newton Long who is a member of the abortion committee at Grady Memorial Hospital to testify as to the operations of the abortion committee and how differing opinions [697] in the areas are and how they apply the law.

I had planned to introduce Dr. Hillis James from Macon, Georgia to testify regarding the rules and regulations of the Macon City Hospital which requires a unanimous decision of the abortion committee, which is contrary to law, which says the majority of the committee must approve.

JUDGE MORGAN: I don't follow you on Macon. We are not trying that; the attack is on this.

MRS. HAMES: This would be evidence which shows that Dr. James is deprived of her right to practice medicine by rules and regulations purportedly promulgated to comply with the statute. It is a misinterpretation of the statute.

JUDGE SMITH: Really, I think we are all shadow boxing. If these doctors propose to get up and say that any procedure like this interferes with their right to practice medicine, then I am sure that everybody can agree they would so testify. Isn't this basically what they are saying?

MRS. HAMES: That is correct.

JUDGE SMITH: I think you have two different questions. If a particular hospital has a local regulation that it will not permit an abortion in its institution except under certain rules, that is a [698] different question from what the state statute provides, because hospitals are free to set their own regulations. They can have their abortions elsewhere as far as that institution is concerned.

JUDGE MORGAN: If this court is properly concerned, it is on the question of the constitutionality of this statute and that is what we —

JUDGE SMITH: Is there any problem of assuming that the plaintiff doctors say that the procedure provided for in the state statute interferes with their right to practice medicine as they see fit? Is there any problem?

MRS. BEASLEY: There would be other doctors who would say this is what we do in cases of surgery or others exactly like that, you would have situations where it would become a fact question. So if they are saying that—there is the requirement which we hold is a health requirement to have this procedure of protection to the woman just as well as it is for the child, as far as the health part of it is concerned—if that in and of itself is unconstitutional, no evidence is necessary. However, if they are trying to show that the way it is applied it is burdensome, then evidence would be required. We wouldn't admit that.

JUDGE SMITH: You wouldn't admit it burdensome; I [699] understand your position. Well, is your attack that it is all right like it is, that it is burdensome, or is your attack that it is not all right like it is?

MRS. HAMES: No, we are asserting that the language of the statute is vague and ambiguous and particularly the word "health." I think this requires interpretation of the word —

JUDGE MORGAN: I don't think we are required to show evidence on whether the word is vague. I think this court — I think that is a legal question, as I see it.

JUDGE SMITH: I may be missing something, but I would suggest that if the court finds it necessary to reconvene on the question of whether a particular hospital is not doing it right, which I don't think we have

any jurisdiction over as a three judge court, then we can reconvene.

MRS. HAMES: Well, we are not trying — we are not saying that any particular hospital is not doing it right. We are merely pointing out defects in the statute. In addition to the term "health", I think that the doctor's interpretation of the word health is certainly relevant to determine whether or not it is a vague term. For example, is this mental health or physical health?

[700]

Also, the term "residence" is one that gives the doctors considerable trouble. There must be a certification by the doctor that the female is a resident of the state. These are areas in which the doctors are placed in position of having to make legal decisions, and their interpretation and the varying interpretations goes to the vagueness or ambiguity of the statute.

JUDGE SMITH: That is what I was driving at a moment ago. They say they are having to make legal decisions when the whole function is to make a medical decision out of it. Do they want somebody else to make the medical decisions for them, is that their position?

MRS. HAMES: No, sir.

JUDGE SMITH: They want to make themselves, this is the whole thing, alone.

MRS. HAMES: No, they do not want a law which delineates only three circumstances under which an abortion may be performed. They want to make the decision whether or not they can perform an abortion on a female based on factors they consider relevant.

JUDGE SMITH: All right. And that position, I don't think anybody will question, this is what they contend, so they are attacking the statute on its face. [701] I may be missing a part of the problem here, but to me that is it, they say this is an interference with their right to practice medicine, just as they might make an attack on a regulation of a hospital that says they have to have the concurrence of a doctor before they have a Cesarean operation is an interference of their right to practice medicine. You don't need a lot of proof about that, do you?

MRS. HAMES: I believe such a regulation would not have the same standing as the abortion statute in Georgia.

JUDGE SMITH: It may not, but it is the same position.

MR. BUCKLEY: You would have the same standing if it was in a state hospital.

JUDGE SMITH: That is right.

MRS. HAMES: The other question which requires proof is the equal protection argument. Mary Doe has made an argument on behalf of the people in her class that she is denied equal protection of the laws. We plan to introduce statistics to show that poor people are not the ones who get the therapeutic abortions. They are the ones who go to the illegal abortionist and have a resulting health problems from it. The law as applied results in a denial of equal protection of the [702] laws.

JUDGE MORGAN: In other words, you are complaining of procedure violations?

MRS. HAMES: The law as applied or as it exists results in hospitals denying abortions to charity patients.

JUDGE SMITH: Is this the fault of the law?

MRS. HAMES: I think it is, yes; if the law were not on the books I think we would —

JUDGE SMITH: But there is nothing in the law that makes it unequal, is there?

MRS. HAMES: The procedure itself whereby one has to get consultation by other doctors imposes a financial burden, so I guess this is as applied.

JUDGE SMITH: Well, wouldn't that suit be against the person who is not applying it right?

MRS. HAMES: I don't understand who would not be applying it right.

JUDGE SMITH: Well, the normal equal protection case is against some state official or some person acting under color of the state law who is not applying the law to the plaintiff as he or it or whatever the authority is, is applying it to everybody else. That is not in this case as it is framed, as I see it.

MRS. HAMES: Well, it is an issue we have raised. [703] Maybe we have not —

JUDGE SMITH: I know you have pleaded it, but there is nothing on that statute that says a different procedure applies to poor people from rich people; there is nothing in that statute that says that.

MRS. HAMES: But in the operation of the statute which we would show by evidence —

JUDGE SMITH: Sue whoever is not operating properly, this is the point there.

MRS. HAMES: I think to require Mary Doe and

poor persons to file suit to get an abortion is placing on her and members of her class an undue burden, and to require every female who is indigent to do this is to deny them of equal protection in and of itself.

JUDGE SMITH: The point I am making is that procedurally I don't think you can raise that question in this kind of suit. I think you have to sue somebody that is not applying the law equally. If the law on its face applies equally, then you have to sue somebody that has not applied it equally, and you haven't done that here. We can wrestle with that, but I am getting worried about the evidence.

JUDGE MORGAN: I think the question comes down to a facial attack on the statute on the Georgia abortion law —

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[704]

AFTER RECESS

JUDGE MORGAN: As a three judge court, we are going to limit our inquiry initially to two questions. First, the jurisdiction which we have already covered; and second, to the merits of the case. If afterwards this court determines that more evidence is required, then we will reconvene. Otherwise, we feel that the attack can be made, possibly made without any evidence. Are you ready to proceed on the question of the merits of the statute?

MR. HIGHT: If Your Honors please, speaking for defendant Lewis R. Slaton, we haven't had an opportunity to reply to the merits. I believe we got off from counsel to Mr. Buckley's argument. We haven't had a chance to reply to the merits as we feel them to be in the case — I mean, not the merits, but the question as to jurisdiction.

JUDGE MORGAN: You can be permitted to file a [705] brief.

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MRS. HAMES: Hames. Do I understand the Court that there will be no evidence on the equal protection question at all?

JUDGE MORGAN: At this time, yes, ma'am, and if it is later determined that it is necessary to have some evidence to pass on this statute, then we will reconvene this court.

MRS. HAMES: Of course, time is of considerable importance in the case, and we have witnesses here today and we would like to dispose of any evidentiary problem. If I could make one more comment about the equal protection matter, and that is that the application of the statute on its face does impose burden on poor people since it requires going to three physicians. This is like the law which permitted all people to appeal their cases to the Court of Appeals but they [706] had to pay for the transcript, and this was held by the Supreme Court in the *Edwards v. California* case to be a denial of equal protection of poor people. I wanted to make this one further point, that the statute on its face does deny equal protection.

JUDGE SMITH: If you want to go in business, it requires you to call on people to get a license and all that kind of thing, or if you want to avoid the zoning ordinance you have to call on different people.

MRS. HAMES: I don't know that that is a basic constitutional right such as we are asserting here.

JUDGE SMITH: The right to profit.

MRS. HAMES: One's right to control one's own person, the right to one's life and liberty, those are substantial issues in this case. That was the situation, liberty was a question in the *Edwards case*. I wanted to make this one point.

JUDGE MORGAN: *Edwards* was a criminal case in California, as I recall.

JUDGE SMITH: As they use "liberty," they are talking about being locked up. As you are using "liberty," you are saying it is your freedom to do what you want to.

MRS. HAMES: I am talking about life in this case, the right to life, because medical statistics show us [707] that it is safer to have a therapeutic abortion than it is to have natural childbirth. To force a woman to bear a child by natural childbirth increases her risk of death, where if she could have an abortion her risk would be less. That is the basic constitutional right to life that we bring under this case.

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[716]

MRS. HAMES: I think that I have already stated the arguments on behalf of the doctors, and they contend the vagueness of the statute and the cumbersomeness of the procedure and the interference of their rights to practice medicine. I would like the right to summarize the argument.

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[717]

MR. HIGHT: . . . The state, as to Mary Doe, is setting forth rules and regulations for Mary Doe, for the

unborn child as such, and a means and method to protect doctors that do perform an abortion; and they are regulating the doctors until you come to a medical question. They are saying, this is the procedure that you use, but when we reach a medical question, then that is for the doctors to determine under the statute itself. We feel like this, of course, is proper under *Griswold*.

JUDGE MORGAN: What about Mary Doe's right to have or not have?

MR. HIGHT: Your Honor, the state at this time is in a position that we don't know why Mary Doe was rejected. Was it because she was not mentally capable of [718] agreeing to an abortion, was it because she was in such a physical condition that she could not medically have an abortion with safety? The state does not know at this time as to Mary Doe.

JUDGE MORGAN: Didn't she allege in the petition why —

MR. HIGHT: No, sir, she alleged she was denied by Grady Hospital abortion committee, and we have no means or knowledge, and we have a motion we filed this morning with the Court we would like for the Court to consider later that we be revealed the identify of Mary Doe if we get into a factual question, and the Court hear evidence so we can properly investigate our case for the defendant Lewis R. Slaton as well as the other defendants.

JUDGE MORGAN: I was under the impression that maybe it was alleged that she had two children, for economic reasons. I thought —

JUDGE SMITH: That is why she wants it, but he is saying he doesn't know why she was denied it.

MR. HIGHT: We don't even know who Mary Doe is and we ask the Court to inform us so we could properly investigate the case.

JUDGE HENDERSON: She also alleges on grounds of her health. Would you like to discuss that on the [719] question?

MR. HIGHT: Yes, we also have filed a motion for a mental and a physical examination of Mary Doe because the state does not know whether Mary Doe is physically or mentally capable of agreeing to an abortion; if she is not, we feel it is incumbent on the court to appoint —

JUDGE HENDERSON: A constitutional question.

MR. HIGHT: — a guardian ad litem.

JUDGE MORGAN: Going to the constitutional question, suppose she is mentally and physically able but she says from an economic standpoint, I can't have it? What would be your contention then? She says, I have a right to, without this statute.

MR. HIGHT: Well, I think —

JUDGE MORGAN: That is a basic attack on the statute as I understand it.

MR. HIGHT: As I think, as *Griswold* points out, her right to privacy is in the marital state, but she is not in the marital state at this time. She is coming out and asking the court to say, I have a constitutional right at any time to go to a hospital, to go to a doctor and say that I am entitled to an abortion. Now, this is not the private marital state that is referred to in *Griswold*.

[720]

Secondly, Your Honor, the right of the father is involved along here. In *Griswold* the court did consider the rights of the father. That was the use of contraceptives in the marital relation between husband and wife. The rights of the father was considered in that particular case, and under their theory it would be lost.

Now, secondly, Your Honor, is that if a woman is declared to have a constitutional right to have an abortion as they allege, without any restrictions, this is, in fact, dictating to a doctor as to how he has to practice medicine, because it does not impose a restriction that this may not be medically feasible in your mind, it may be something you feel that as a doctor you cannot give an abortion for, and he may be subject to a suit for infringing on her constitutional rights to an abortion.

JUDGE HENDERSON: You mean if he is asked for it, he has to do it?

MR. HIGHT: Your Honor, I think under what they are alleging is that the hospital as such has to give her an abortion regardless of whether she is able to pay for it, the state and the people are required to pay for an abortion, and this is not like —

JUDGE MORGAN: I didn't interpret it that way.

[721]

JUDGE HENDERSON: I don't think they are making that contention.

MR. HIGHT: That's what they say, Your Honor; she is poor; she is unable to pay for an abortion; and she is subject to this type of infirmity; they bring the

idea that she is poor; she is unable to pay for an abortion; unable to pay for the doctors. I think the matter was raised in *U.S. v. Vuitch*, wherein it is stated that the poor person should have the constitutional right to have an abortion as any other person in the state hospital, or in such a situation that we recommend they start to become more liberal in that regard. But, what I am saying is that it is a very serious question involved here as to whether she can go so far as to have the right to an abortion. The father is not considered, the other parties are not considered in society. Society is told it is not a private matter anymore; it is not in the confines of the marital state, but it is coming out to medical authorities, doctors, hospitals, and saying, I'm entitled to an abortion under the Constitution.

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[722]

We feel that in this particular case that there are other rights other than Mary Doe, the rights of the unborn child —

JUDGE MORGAN: What is the difference of the rights of an unborn child here and where there is a forcible rape?

MR. HIGHT: In that particular situation —

JUDGE MORGAN: You have an exception in the statute. What is the difference if you can look at it from the child's standpoint?

MR. HIGHT: The statute in this case, Your Honor, as I interpret it — and I believe the hospitals interpret it — make the necessity of an abortion a question for the medical authorities as to whether this woman needs an abortion.

JUDGE MORGAN: In a forcible rape case?

MR. HIGHT: No, sir. I'm talking about in a [723] normal situation, therapeutic abortion. In the case of rape it also requires in the statute —

JUDGE MORGAN: I'm looking at it from the unborn child's standpoint. What is the difference?

MR. HIGHT: There is none, Your Honor, as far as the statute because in each case under the statute the same procedure is followed, and with the rape victim an additional procedure is used. In each case the doctor certifies the need under the statute that an abortion is necessary because of one of these three.

JUDGE MORGAN: I was questioning from the standpoint you were looking at it—from the unborn child. I don't see any difference with the unborn child's rights in the case of rape.

MR. HIGHT: This evolves into a medical question for the doctor to determine as to whether or not in this situation, as in any therapeutic abortion, it is such a medical question that an abortion should be performed. This is the way the statute leaves it, that if this rape victim, statutory rape, young girl, is at such a degree of hypertension, physical or mental, that the doctor and the statute would consent to an abortion.

JUDGE SMITH: As I read it, she doesn't have to be under hypertension; if she is a rapee, that's it.

[724]

MR. HIGHT: But the doctor is still under the statute.

JUDGE MORGAN: I was looking at it from the

unborn child. You put it on the basis and I don't see the difference. That is what I'm saying.

MR. HIGHT: I think in that situation what you have, of course, is an overriding, perhaps policy or state policy to protect victims of a forcible rape that you do not have in a normal —

JUDGE MORGAN: But looking at it from the unborn baby's standpoint, I don't see any difference.

MR. HIGHT: No, sir, you don't, as far as the child is concerned, but you have such an overwhelming right in favor of the prospective mother that you don't have in a situation where the mother has all types and means to prevent conception. Then, after conception you have a father's right involved and a number of other rights you don't have in a rape victim. If the Court is determined to hear facts in the case, we would respectfully request that you consider our motion to disclose the identity of Mary Doe.

JUDGE MORGAN: All right. Mrs. Beasley, were you going to argue for the defendant?

MRS. BEASLEY: Your Honor, with respect to this rape question, I think it perhaps grew up a long time [725] ago because it actually did have to do with the health of the mother.

JUDGE MORGAN: Maybe the abortion statute grew up a long time ago, too.

MRS. BEASLEY: Indeed it did. It certainly was part of the common law which we have mentioned, of course, in our briefs; and Blackstone mentioned it. I think that was one of the very reasons why the child's life is protected under our Constitution too, as well as

the mother's rights of privacy, if, indeed, there are such in this case. I don't think that when our Constitution was written, it did not take into account the protection of life and pursuit of life that an unborn child had because the common law in our states, the first abortion statute was in 1831; however, the Fourteenth Amendment came after that even, so that under the Constitution there was imbued upon it the fact that the unborn child was recognized by the community as having some rights of protection. That is exactly what we have now, plus the fact that perhaps it even has more right of protection now because modern medicine being what it is, it becomes viable at a much earlier stage of its development, so that a child that is being carried by a woman is much closer to life now even than it was during common law.

[726]

Plaintiffs keep referring to the woman's right to choose whether or not she should bear children. I don't think that the statute really has anything to do with that. Certainly it does not infringe upon her right to not bear children. She has many methods by which she may exert that right. Georgia has a new sterilization law passed during this General Assembly whereby all it takes is the consent of the husband and wife for sterilization to occur. That assists her in having this right not to bear children, and the various types of contraceptives certainly give her an opportunity not to bear children. Thirdly, and most traditionally, abstention. She has voluntarily put herself in the position to have this child and once that life is kindled in her, the state takes the position that it has the right to be born because it is regarded as a life.

The plaintiffs take a position whereby they completely

ignore the balancing. They say it is not a balancing. They look at it with one eye closed; they look only at the woman's rights, but what about the child's rights? It is myopic, I think, to look at it as though only the mother had any rights. The law is replete with examples of where an unborn child has certain legal rights and those, of course, have been [727] well laid out, I think, in some of the briefs.

JUDGE MORGAN: How do you answer the question I propounded to Mr. Hight in regard to the forced rape? That child has a right, too, doesn't it?

MRS. BEASLEY: Yes, it does, but there you come to a balancing of who has the right to life. I think in that respect —

JUDGE MORGAN: Who has the right to life?

MRS. BEASLEY: Who has the right to life and pursuit of happiness, and there the state has taken the position that examples and experience has been that people who have been raped, women who have been raped, it is going to so effect their lives that perhaps it becomes almost a health or mental question, and it is going to leave open this exception. It doesn't mandate that you have to have an abortion if you are raped, but it leaves this open to you. The state takes the position that what repayment can be done to a person who has been the victim of such a crime, and this is the only way in which her life and the continuation of it in a normal fashion in the way she chooses can go on if she is given the opportunity to stop the life which is growing in her without any voluntariness on her part. But in these cases, the plaintiffs put themselves in the position where they believe that [728] for whatever reason—and we talked about economic rights—

very often, I think, if we went into the evidence, we would see that mental health can include an economic situation where the woman will become so mentally disturbed if she had to bear another child she couldn't afford, that it would have an effect and perhaps that situation could very well come under this statute, and if we went into evidence, we would be happy to show —

JUDGE SMITH: Do you think it is possible for different states to have different public policies on this matter, legally?

MRS. BEASLEY: Yes, I do. I think that if the state takes the position where it wants to protect its unborn children as prospective citizens of its state, it should have the right to do so.

JUDGE SMITH: I would assume legally if there is a basic constitutional prohibition against it that the state could not.

MRS. BEASLEY: If that were determined. We don't have a case saying that the Federal Government, or under the Federal Constitution you take that view. The view has been espoused that the state has the right to control this area of abortion.

JUDGE SMITH: Well, I'm making the comparison like [729] gambling. Some people may consider the pursuit of happiness to be able to gamble, and this law varies from state to state. Each state has the right to make its own public policy in some area. Now, I would assume, though, that legally a state would be free to do that unless there is some basic Federal constitutional guide that says everybody has to be alike in this area and namely that is have nothing, have no restrictions against abortion.

MRS. BEASLEY: I think a good argument could be made for it to be a Federal constitutional right for the unborn child to have a right to live. The basis of it is, as I pointed out in the beginning —

JUDGE SMITH: Well, the point I am making is that in the tort area the laws do vary from state to state for unborn children.

MRS. BEASLEY: That is right.

JUDGE SMITH: Do you think this is right in this field also?

MRS. BEASLEY: No, sir, not necessarily. I think that as far as Georgia is concerned we have always looked at the unborn child as having rights and having protection of his life to be born; but I think also that under the Federal Constitution, which guarantees protection of life, it can be said and it can be argued [730] that this includes the right of life of the unborn child. He would have a right under the Federal Constitution which means that it would have to apply to all the states, as far as his life is concerned — not tort law or laws of inheritance, which are specifically delegated to the states — but if you have a basic right to life which we believe this unborn child has, if the woman is going to be allowed to terminate this life because of her desire, what is to prevent the law from stopping her from killing this child after it is born? What is the difference? If she says she has a right not to bear that child and not to raise that child for twenty years as plaintiffs argue, then why does she have to after it has been born?

JUDGE MORGAN: Are you making a distinction between before and after the child becomes a person?

MRS. BEASLEY: I am not, I think the plaintiffs are, and I don't think that they can do so logically. I think the child has a right to life from the moment of its conception, but the plaintiffs would like to have what they call abortion on demand.

Now, in cases of marriage and right to privacy and sexual relations and so on, there are two parties and that is why the state may not invade, but the situation is far different when a third party gets [731] involved, and that is the unborn who is the weakest one of the three, who is absolutely helpless. That is where we say the state has a right to protect.

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JUDGE HENDERSON: In the argument saying that the state has the right to except victims of forcible rape, is the state saying that they are presuming there is a health problem that will occur by reason of forcible rape? In other words, the woman and her mental health. Isn't that what they are saying there?

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[732]

MR. WITT: May it please the Court, representing Chief Jenkins, I wanted to in cameo support Mr. Buckley's argument on intervention by showing to the Court the position of Chief Jenkins in this matter. Chief Jenkins has no policy making functions in state laws. He is a police officer and he has the administration of the City of Atlanta police. He has an interest in this case, and that is that he be able to discern what laws he is going to be required to enforce. That is the reason that on behalf of the Chief a brief with respect only to the abstention doctrine was filed. With all [733] due respect, it is

very difficult as a lawyer not to engage in these other matters that are very crucial and very critical in our society today, but because the Chief has no policy making function it would not be within his domain to inject his notions into this case personally.

JUDGE MORGAN: Actually, Mr. Slaton would be the one to enforce this law, the Attorney General.

MR. WITT: Basically that is correct, Your Honor. I was prepared to submit an affidavit as part of the evidence in this case which the Court could well consider to the effect that no arrests for abortions committed by a doctor in a hospital have been made by the Atlanta Police Department. These, aside from the question of abortions committed by unlicensed practitioners of some sort, this leaves aside the question of abortion which may or may not be outside of a hospital. This is strictly the kind of procedure that is involved in this statute.

In that respect, I believe Mr. Buckley's urging on the Court the need for child representation is kind of highlighted in cameo by the Chief's position where he can't urge these things properly. He has no interest in it, and, of course, our legal system believes that a problem is best presented to a court by [734] adverse interest arguing very earnestly for their position, which is not the position I find myself in this morning, with the one exception of the abstention doctrine. I think that is very critical in this case,

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MR. HIGHT: Under the Georgia Code section in question the state has the right to protect any interest of the unborn child by appropriate action in this court;

we do not. And if the Court does reach the merits of the case, in order to protect the rights of the unborn child, we would respectfully ask that Mr. Buckley be permitted to intervene as guardian ad litem.

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MR. BUCKLEY: . . . [737] In any event, the law specifically says that an action for declaratory judgment may be brought in the Superior Court of the county in question wherein the court may determine whether or not the constitutional or other legal rights of the unborn child are being violated, and if so, may grant an injunction, so that says that even in the event of a rape, even in the event of an alleged probable deformity, in the event of a critical illness, there is a forum provided, as there should be, under our system of constitutional law, for the testing of the rights of the unborn child.

Now, I would submit that arguing solely from the point of view of the unborn child — and that is the only point of view that I represent — that even in the event of rape that is a very extreme consequence for the unborn child. That brings me to the focus, I think, of the entire argument in this case, and that is this. I think a lot of people are inclined to view the constitutional law as some sophisticated area of the law where only people who call themselves constitutional lawyers are permitted to practice. Constitutional law is not unlike any other area of the law. [738] This is an equity case, and in equity we have been dealing for centuries with the balancing of convenience, the balancing of interest. Common law is really the same thing. We have — and *Griswold* did not enounce any brand new concept of law. The Supreme Court has recognized for years and years and years the basic right of family privacy, the right of

the family to control the conduct of children, for example. However, all of those cases over the years, you keep seeing recurring the qualifications that those rights must be balanced against others' interests.

* * * * *

[740]

But here you don't have any right known to man that exists in a vacuum. We are all members of society and you don't have a right over your body that permits you, for example, to go through the traffic light when it is red, because my body may be coming the other way and we might collide. That is the trouble with rights — they collide. And that is what the courts are for, to determine, and that is what the Legislatures are for, is to determine when laws should be and rules should be laid down to try to avoid collisions or try to determine systems and procedures for balancing these conveniences and these interests and these rights, to try to weigh these rights and then determine in this instance, using again the illustration of rape, for example.

* * * * *

[743]

Well, common law has found since then, not just by looking at a crystal ball, but by looking at medical practice and the progress of medical practice, the common law has found that the fetus is in no sense of the word a part of the mother. He has all of the characteristics of a human being, and as one person I was speaking with the other day said, it must be a human being because he isn't any other kind of being. He is in being. In any dictionary sense of the word, it is a human being. He has his own circulatory system, his own digestive system, he reacts to light, pain, to various forms of stimuli;

and to say that, as asked by counsel for plaintiff, that we are going to say that there is some magic at the threshold of the moment of delivery and that we are going to say that no one can regulate this child except the mother up until the moment of delivery, that would be absurd I think.

* * * * *

[746] And here this law was not adopted just on the spur of the moment. There was legislative hearings that went into this consideration and there were many arguments—economic, medical, statistical, and philosophical. These arguments were thrashed out at considerable length and not one but two different legislative [747] sessions. Then, again, in the course of an amendment being offered at the 1970 session, there were further hearings on this matter, and as Mr. Witt pointed out, there is a rather peculiar situation in that we are not exactly sure which of these two statutes the Georgia Supreme Court may say is the one that is enforced in Georgia. The Court will recall that they were both adopted. One is a part of the overall criminal code that was revised in 1968 session of the General Assembly, and the other was a carry-over special act dealing only with abortion that carried over from '67 and was finally enacted in '68. So we have two similar but slightly different laws.

* * * * *

[748]

Medical science says he is a separate and distinct entity.

* * * * *

[752]

I submit that this is the whole thread of my argument, from the time of conception a life comes into being

and there is no medical differentiation based on a difference in the life of that child at eleven weeks as compared with thirteen weeks or eleven weeks as compared with twenty weeks. The only difference is the ease of performing an abortion, and I submit that that is not a criteria to apply in deciding the rights of the unborn. This is a legal person who has a legally protected right and I respectfully say that the Court must consider that right and should uphold the statute.

* * * * *

[755]

We have been asked today for the first time to identify Mary Doe. Mary Doe is present in court, and I think our proffer of testimony was an offer to have her testify as to her particular situation. To request that she be given a medical or physical examination at this late date is too late, in my opinion, because this could have been done several weeks ago. There is no need for us to allege the negative of all these particulars that have been asserted, that she is mentally competent to file a petition.

* * * * *

[756]

Now, in our evidence which we had planned to present today, we were going to get into the question of statistics to show that the major group of women who receive abortions are white and of the upper economic classification. I think there is sufficient medical and sociological studies in the area that the Court can take judicial notice of these studies.

JUDGE SMITH: Is that true under this law? Do those statistics relate only to abortions in Georgia under this law?

MRS. HAMES: Yes.

JUDGE SMITH: Does this count the rich gal that [757] flies off to Sweden?

MRS. HAMES: No. When we talk about the statistics in Georgia, we are talking about abortions performed in Georgia, so that the rich gal that flies to Sweden or to New York or to Johns-Hopkins is not counted as an abortion.

JUDGE SMITH: In other words, the statistics you attach in your appendix relate only to legal abortions occurring in Georgia under this law?

MRS. HAMES: That is correct.

JUDGE SMITH: And how do those relate to the population percentage?

MRS. HAMES: To the population percentage?

JUDGE SMITH: Yes. Of rich to poor. Who decides who is poor and who is rich?

MRS. HAMES: That was in a statistical study that we had planned to introduce by Dr. John Asher who has made such a statement. It is not attached to our brief. There he made an analysis of the people at Grady Memorial Hospital who had received the abortion, and in this connection, I believe, it was eighty percent of them that were white that received the abortion and sixty percent in the upper socioeconomic classification. I'd have to ask him questions about how he arrived —

[758]

JUDGE SMITH: How does that relate to who asked to have one?

MRS. HAMES: That was other evidence to show

that people who asked for abortions can be turned down at various levels and never get them. Those are the women who are uninitiated in the medical care, in seeking medical care. They merely make the request and are turned away by a clerk. We don't know how many of those there are.

I did want to point out in the report of the U. S. Public Health Service that is attached to the brief, you compare abortions, therapeutic abortions to live births in the hospital, Grady Memorial Hospital in 1969 had five per one thousand live births and that is compared to five hundred sixteen at Johns-Hopkins. This, we submit, is evidence that the law in Georgia is not meeting the needs. Obviously there is no greater need for abortions in Johns-Hopkins and in Maryland than there is in any other state.

In another report, which we attach to the brief, there is information that seventy-seven women died in Georgia from 1960 to 1968 as a result of illegal abortions. Now, the authorities tell us that for every one that dies there is ten thousand illegal abortions, so that leads you to see the extent of the [759] health problem that we have in Georgia alone. In the last two years there were fourteen blacks that died in Georgia from illegal abortions. This we contend is a health problem which is caused as a result of the abortion statute. Since the procedures are burdensome and costly it drives the women, in particular the poor women, to an inexpensive, illegal abortionist.

JUDGE MORGAN: What about the contention that there are probably two statutes in Georgia, one under the adopted criminal code and one under the —

MRS. HAMES: It is my understanding that the statute 26-9925, the one that is printed at the end of the new Georgia criminal code was adopted April 11th, or it became effective April 11 or 12th when the governor did not sign the bill — this was April 11, 1968 — that was the original abortion law in Georgia.

Now, at the same time they adopted the new criminal code for Georgia which embodied the same provisions. They are the same.

JUDGE MORGAN: The same statute?

MRS. HAMES: Yes, they are the same provisions, but they were not to become effective until July 1st, 1969. So the 26-99 provisions were to give Georgia citizens the benefit of the abortion statute prior to the new criminal law coming into effect.

* * * * *

[761]

JUDGE HENDERSON: You want to have all abortions, you don't have any distinction, do you? You want to declare all the laws about abortions unconstitutional [762] and let the doctor perform them whether it is for the health of the mother or not.

MRS. HAMES: That is correct.

JUDGE SMITH: What if it happened that all doctors in Georgia were real conservative and they had decided in their medical meeting that it was bad to have abortions. Where would you be then?

MRS. HAMES: I think there would be a duty on behalf of the public hospitals to hire doctors who would provide this service for indigent persons. Now, as far as private patients are concerned, I don't think there

would be any way to compel.

* * * * *

MRS. HAMES: I think there is a duty when the County of Fulton and DeKalb undertakes to provide medical services to the indigent that they must provide all medical services.

* * * * *

[763]

JUDGE SMITH: Anybody.

MRS. HAMES: I don't think there is any remedy to compel the performance of an abortion now.

JUDGE SMITH: If they could get them at Hopkins and couldn't get them in Georgia, where would we be legally? This would mean you would have to move into a jurisdiction where the public policy and attitude were different, wouldn't you?

MRS. HAMES: That is correct, and I think that runs to the equal protection argument which we have made. I think that is the situation we find ourselves in now, that people who have money can go to Hopkins. They can go to California, they soon are going to be able to go to New York.

* * * * *

[770]

MR. BUCKLEY: On factual question, Your Honor, and not involving evidence, but since the allegations of the complainant, as I recall, projected the fetus as being approximately nine weeks or so, and since I believe Mrs. Hames told me in private conversation that the fetus in this situation is actually four or five weeks older than that; it never has been changed in the plead-

ing and never has been referred to in plaintiff's briefs; and I think it would be appropriate to inquire as to whether that allegation is correct or should be amended.

JUDGE SMITH: I don't know the relevancy, but will you stipulate at the time of filing suit that the fetus was four or five weeks older than alleged? That is all he is asking.

[771]

MRS. HAMES: I think we could stipulate that Mary Doe is about twenty weeks pregnant at the present time, and that is because women sometimes miscalculate and with three of us doing it, all three of us miscalculated.

JUDGE MORGAN: Thank you.

The Court will permit you to file along with your brief on the jurisdiction — if you desire additional briefs on the merits, and any cases which you feel like have been omitted or haven't been cited. That is left up to you.

I will say this again; that if the Court determines to decide this case, if evidence should be considered, we will reconvene it; otherwise, we will pass on the argument.

[774]

(Filed in Clerk's Office Oct. 14, 1970, Claude L. Goza,
Clerk; By: PWM, Deputy Clerk)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MARY DOE, et al

vs.

ARTHUR K. BOLTON, as
Attorney General of the
State of Georgia; et al

CIVIL ACTION
NUMBER 13676

Since the Court's opinion of July 31, 1970, several motions have been filed necessitating this opinion and order.

MOTION OF AMICUS CURIAE

Ferdinand Buckley filed a motion on September 3, 1970, to alter or amend the Court's judgment of August 25, 1970, to rule on several of his earlier motions and prayers. Accordingly, that judgment is hereby amended in the following (See FN) respect:

Mr. Buckley's motion for reconsideration of the order revoking his appointment as guardian *ad litem* for the embryo (or fetus), and his motion to intervene in any representative capacity on behalf of the embryo or fetus is denied. This ruling makes it unnecessary, and the Court declines, to rule on the prayers in the answer and counterclaim Mr. Buckley filed before revocation of his appointment as guardian *ad litem*.

MOTIONS OF JANE ROE

Jane Roe petitions for leave to intervene as a plaintiff, moves for a temporary restraining order, and asks that the Court clarify and enforce its opinion of July 31, 1970. Said petition, and accordingly also the motion and the request are denied for two reasons.

[775]

First, the Court is informed by counsel for all concerned that Georgia Baptist Hospital has reconsidered its earlier decision and subsequently granted Jane Roe's application for an abortion. Said action renders the petition of Jane Roe moot, there now being no sufficient collision of interests between Jane Roe and the defendants.

Second, Jane Roe's petition to intervene makes it clear that her controversy was with Georgia Baptist Hospital, and only tangentially with the defendants in this case. Under such circumstances there is no showing that Mary Doe—representing the class of pregnant women denied abortions because of the Georgia statute attacked—could not adequately represent the tangential interest of Jane Roe in this action. *See Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 141 (1944); *Durkin v. Pet Milk Co.*, 14 F.R.D. 374 (W.D. Ark. 1953).

In spite of the above, the motion presents an aspect of the case which justifies some amplification of the previous declaratory judgment. The court concludes that this should be done by way of amendment sua sponte. Rule 60(b)(6); *Klapcott v. United States*, 335 U. S. 601 (1948); *Bros. Incorporated v. W. E. Grace Mfg. Co.*, 320 F.2d 594 (5th Cir. 1963).

The problem relates to the role and function of the "abortion committees" in the several hospitals. Ga. Code §26-1202(5). The thrust of the original opinion was to carry out the apparent intent of the Georgia legislature by making the ultimate decision on individual abortions a medical one. However, in line with constitutional principles, the ultimate decision cannot be [776] restricted to the three reasons stated in the statute. This left the abortion committee free to decide whether an abortion was "necessary" on the broader medical basis, namely, the totality of circumstances surrounding each patient.

From the motion it is apparent that those committees who have voluntarily adopted the standards promulgated by the American College of Obstetricians and Gynecologists as controlling have placed themselves in the position of being restricted by the same reasons stated in the statute.¹ What is denied directly cannot be accomplished indirectly. It follows that the abortion committees cannot be limited to the stated reasons as the sole

¹The Georgia statute requires the hospital to apply standards promulgated by the Joint Commission on the Accreditation of Hospitals. No such restrictive reasons for approval of an abortion are contained therein. However, the voluntary standards promulgated by the American College of Obstetricians and Gynecologists in part limit the grounds for abortion to the three stated statutory reasons: injury to health of the mother; danger of grave physical or mental defect to the child; and pregnancy due to rape. Any such limiting restrictions, as seen, must fail. Likewise, lack of consent by the husband, while it may freely be considered by the committee, may not be automatically established as an absolute bar.

By way of additional comment, good faith administration of the statute as now constituted would prohibit a committee from secretly restricting abortions to those statutory reasons, which the court has already deleted. To the contrary, all relevant factors should be considered and an informed medical judgment made.

basis for approval of an individual abortion, nor can they so limit themselves by the adoption of such standards. Any such action by a hospital committee is declared to be an unconstitutional exercise of delegated power.

[777]

In sum, the statutory processes of approval are left standing. The patient is required to obtain the approval of (1) the certifying physician, (2) the two consulting physicians, and (3) the abortion committee of the admitting hospital. Failure to obtain approval at any level necessarily precludes abortion on that application. A majority of the abortion committee shall control its action, whether for approval or for disapproval.

To the extent stated herein, the original opinion is modified.

IT IS SO ORDERED.

This the 13 day of October, 1970.

/s/ LEWIS R. MORGAN

LEWIS R. MORGAN
United States Circuit Judge

/s/ SIDNEY O. SMITH, JR.

SIDNEY O. SMITH, JR.
United States District Judge

/s/ ALBERT J. HENDERSON, JR.

ALBERT J. HENDERSON, JR.
United States District Judge

